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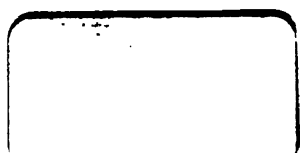
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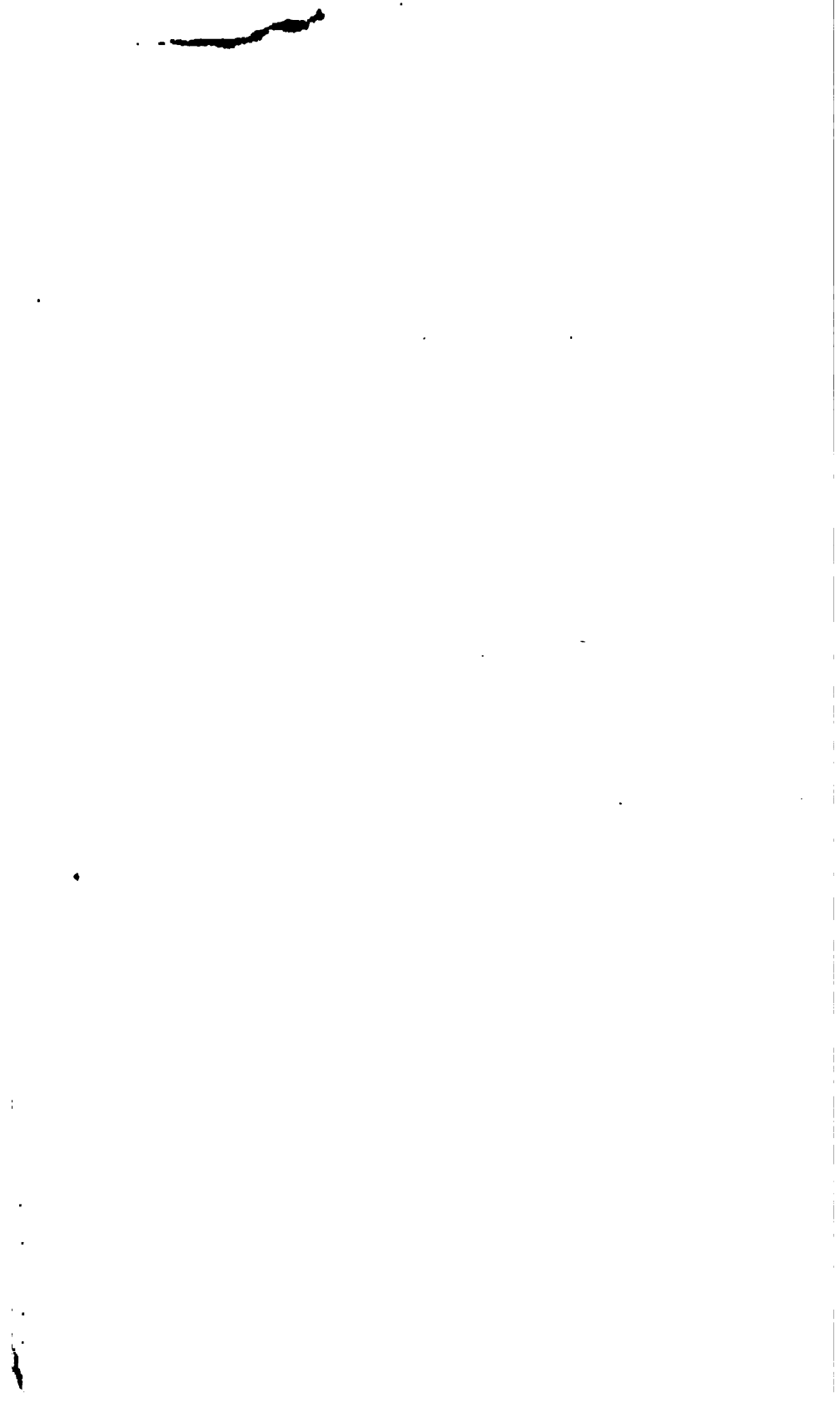
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R E P O R T S

O F

C A S E S

ARGUED AND ADJUDGED IN THE

Courts of King's Bench, Common Pleas, and Exchequer.

TO WHICH ARE ADDED,

Some SPECIAL CASES in the COURT of CHANCERY;
And before the DELEGATES.

By the Right Hon. Sir *JOHN COMYNS*, Knt.
Late Lord Chief Baron of his Majesty's Court of Exchequer.

With TABLES of the CASES, and of the PRINCIPAL MATTERS.

The SECOND EDITION, Corrected;

With MARGINAL NOTES and REFERENCES to former and later Reports,
and other Books of Authority;

By SAMUEL ROSE, of *Lincoln's-Inn*, Esq.

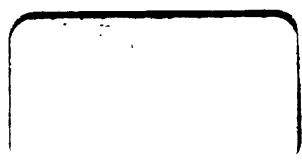
IN TWO VOLUMES.

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1792.



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nature of a previous condition, as in the case of *Langley* and *Baldwin*, but rather are designed to denote the time when the charitable bequests should take effect, *from and immediately after the death of my wife, and the death of my nephew Thomas Sutton without issue male of his body, or after the death of such issue male, I devise to my said trustees, &c.* And as there appears no intent of the testator to give his nephew any other estate than before, so the words may be satisfied with a different construction; for the words *from and immediately after* seem relative to the devises before, immediately after the estates already given, *I devise to my trustees*, and then after the death of the nephew without such issue male, as before mentioned; or it may mean no more than this, if at the death of my nephew he have no issue male living, or if he have, when they die, the estate shall immediately go to his trustees; and in case such construction be not made, the words *or after the death of such issue male* must be rejected, and are intirely uselefs.

What is said, that the words recited in the restraining clauses, which were designed to prevent his defeating his charities, *then the bequests to him and the heirs male of his body shall be void, if he and the heirs male of his body do waste, &c.* import that the estate-tail was intended to the nephew by the testator, do not necessarily conclude so far, since they may be satisfied by the bequests given before to him and his sons; and it would make wills very uncertain, if every uncautious and incorrect expression *in transitu* should be laid hold on; to determine the testator's meaning to be different from what seems to be so upon the consideration of the whole will. It is true, every such expression may be made use of to illustrate the testator's intention, and that was all that was done in *Sunday's* case, 9 Co. 127. where, upon the whole complexion of the will, the testator's will was held to be, that all the children should have the like estate, and not some to take in tail, and others only for life.

These things were mentioned, not to deliver the opinion of the Court upon this point one way or other, but to shew that

that it might deserve consideration, and being a question at law was fit to be left to a trial, and not determined in equity, especially since it appeared that there had been some doubt in the case; for when the Exchequer allowed the plea, they must have concluded that *Thomas Sutton* the nephew took an estate-tail by the will; and when the House of Lords reversed their decree, it argued at least, that they thought it doubtful, and deserving further consideration.

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As to the farm and estate in the county of *Suffolk*, whereof the devisor had only an equitable interest, and the legal estate was in *Thomas Sutton* the nephew, that stood upon a different foot, and was proper for a court of equity to determine.

The Court clearly agreed, that there was no difference in the construction of the words of the will in a court of equity from what they would have in a court of law; and therefore if a devise of lands was made by him who had only an equitable interest, or was but *cestui que trust*, the devisee would take the same estate in all respects as he would have done from the same words if the devisor had been seised in fee of the legal estate; nor will any difference arise in the construction of the words of the will from the remainders being limited or disposed of for charitable uses, than what would arise if the same remainders had been disposed of to private persons.

Supra, p. 427.

But in this case the bill is, that the heir and devisees of *Thomas Sutton* the nephew may be decreed to convey pursuant to the directions of the will. He in the first place charges and subjects all his estate to the payment of his debts, and to the annuities and legacies given by his will; then, taking notice that the legal estate of this farm in *Suffolk* was in his nephew *Thomas Sutton*, he directs him to convey the same to the trustees afternamed and their heirs, upon the several uses, trusts and purposes after limited and appointed, or else to declare the trust thereof by deed, &c. in such manner as the said trustees shall reasonably think fit and require, in twelve months after his decease. Now in case the bill or information

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formation had been exhibited within the twelve months to enforce such conveyance or declaration of trust, would not the Court have enforced a strict execution of the conveyance, such as might not have left it in the power of the trustee presently to defeat it? It is apparently the intent of the testator, that the lands in *Suffolk* should go to his nephew for life only; that after failure of his children and their issues, it should go to the charities specified in the will; that the nephew should not defeat them; that on his refusal to declare the trusts, he should lose all the benefit given him by the will; would the Court then have enabled him immediately to have defeated them? No surely, they would have put it out of his power to do so. The subsequent uses, trusts and bequests in the will are only specifications of the special uses and trusts the testator desired to have perpetuated and take effect; and therefore the conveyance or declaration of the trust must have been directed in such manner as that they might take effect; it was to be done in such manner as the trustees should reasonably think fit and require; would it have been reasonable to require such a conveyance as might immediately have been defeated, and the trustees barred of the estate and interest intended them? The conveyance in this case must have been directed agreeably to what would have been done in the case of marriage articles. And the utmost that could have been asked from the words, *after the death of my nephew Thomas Sutton, without issue male of his body begotten, or after the death of such issue male*, would have been, that an estate should be limited to any other sons the testator should have, in the same manner as it was given by the will to his first and second son, not that it should be limited to him and the heirs male of his body, so as to defeat all subsequent limitations.

That this is now the constant method of courts of equity, in the execution of conveyances upon marriage articles or other agreements; the case of *Trevor and Trevor* was solemnly debated and considered, and afterwards affirmed in the House of Lords. There the Master of the Rolls, Sir

Supra p. 416.

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John Trouer, had agreed by marriage articles to settle an estate on himself for life, then to his wife for life, then to the issues male of his body by such wife; and in case no settlement was made in two years after the marriage, the persons seised should stand seised to the same uses; after the two years he suffered a recovery, and disposed of the estate by will; but all was set aside, and the construction made was, that the articles should have been executed so as not to have enabled the Master of the Rolls to defeat the children of the marriage. And although it was insisted, that by the covenant to stand seised the estate was now executed to the limitations as expressed in the articles, it was held that ought to make no alteration.

So in the case of *Papilion (a)* and *Voice*, determined by the Master of the Rolls, and afterwards agreed to by the Lord Chancellor, it was directed, that where a person devised monies to be laid out in the purchase of lands, to be settled upon *A.* for life, and after to the heirs male of the body of *A.* it was held, that such settlement should be made as might effectually secure the estate for the benefit of the several issues of *A.* But by many cases of a like nature in courts of equity, it seems to be just, that where conveyances are to be carried into execution, pursuant to the direction of articles or a last will, the same should be executed in such a manner as may secure to every one the estate or benefit intended him, if it may be done consistently with the rules of law; and not executed in such a way as will enable one person to defeat the estate of another, if it can be properly prevented. And such execution as would have been decreed against the nephew, if living, or if the information had been exhibited in twelve months after the testator's decease, the same ought to be executed by his representatives now; and whatever the trustee hath done to prevent it, is contrary to the duty of a trustee. And therefore the Court declared, that the common recovery suffered by *Thomas Sutton* the nephew, of the estate in the county of *Suffolk*, and the deed leading the uses of it, were a breach of trust, and ought to be set aside; and that the heir and devisees should join in executing a conveyance

(a) 1 P. Wms.
471.
2 Kely. 97.
Fi. 25. 38.
1 Eq. Abr. 285.
pl. 30.

Forn. 14.

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conveyance to the trustees named in the will, or such others as should be appointed trustees according to the direction of the will, upon the uses and trusts not yet determined which were mentioned in the will; that they should likewise deliver possession, and account for the profits they had respectively received since the relators were intitled; and that the bill should be retained for a year, and either side at liberty to try the title at law, for that part which was not the trust-estate, and then resort to the Court for further directions, and that the plaintiffs should have their costs.
(1)

(1) Upon which the *Suttons*, (who claimed under the recovery) afterwards brought their ejectment in the Court of Exchequer, which was tried in *Hilary* vacation 1735, and the jury found a special verdict, viz. the said *John Sutton's* will, and all facts necessary to bring the matter of law before the Court, and in *Easter* term 1737,

the special verdict was argued; in the term following, the Court gave judgment for the lessors of the plaintiff, being of opinion that *Thomas Sutton*, the nephew took an estate tail in the *Chequer-lan*, and on the 22d of *June*, 1737, the Court ordered the tenants to attorn, &c. to the *Suttons*. 1 P. Wms. p. 767. in note.

Case 291. Attorney General *vers.* Elizabeth White, Executrix of James White. In Scacc'.

If the king's debtor dies, he may pursue his remedy against his executor at any time.
Park. 102.

AN information of debt was exhibited in *Trinity* term, on the 29th of *June*, 12 *Geo.* 2. against the defendant for 1140*l.* for the duties of 3600 gallons of brandy imported by her testator on the 10th of *February* preceding. On *nil debet* pleaded, the jury find that the testator imported these brandies in the year 1719 and 1720, in casks containing but twelve gallons each, and that he before the duties paid, which came to 1140*l.* died (to wit) on the 20th of *February* 1725, having made his will, and his wife, the defendant, executrix.

On this verdict it was insisted on behalf of the defendant, that since by Statute (a) 4 & 5 *W. & M. c. 5. sec. 8.* the importation of brandy in small vessels and casks not containing each sixty gallons at least, was prohibited on pain of forfeiting

(a) Vide Stat. 19 *Geo.* 3. c. 69. sec. 1.
4 Term Rep. 466.

forfeiting the said brandy or value thereof, &c. the King ought in this case to have sued for the forfeiture, and not by way of debt for the duties or customs, which would have been payable in case the brandy had been fairly imported.

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At least the duty in this case arising *ex delicto* from the unlawful importing of the brandy in small casks, however the king might have dispensed with the forfeiture, and demanded the duty against the testator, he cannot do so to charge the executrix, against whom in this case debt is not maintainable.

And it was argued by Mr. Ward and Mr. Bootle, counsel for the defendant, that where goods were absolutely prohibited to be imported, the importation occasioned a forfeiture of the goods, which the King could not dispense with; that there was a wide difference between goods on which a duty was laid, and a forfeiture given as a penalty for non-payment of the duty, and goods that were prohibited to be imported, and forfeited in case they were so. In the first case it was not much controverted but that the King might waive the penalty and accept of the duty, and if they were carried into the Custom-House, the duties might there be accepted, but if prohibited goods were carried to the Custom-House, the forfeiture still continued.

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When goods are prohibited the intent of the law is, that no duty should be paid for them because they are not to be imported at all; but if upon the importation a duty may be accepted instead of the forfeiture, the importation would be encouraged, and the intent of the law-makers defeated.

But in case the King could dispense with the forfeiture and take the duty, he ought to make his election to do so in the life of the party, otherwise it would be highly inconvenient; for as the King's debt must be first satisfied, it may happen after a merchant has been dead twenty or thirty years, and his executor had administered, paid all his debts,

Infra p. 485.
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and

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and disposed of all his affets, a claim might be set up for duties upon goods imported which the executor has no knowledge of, and can make no defence against, and every thing turned round, or the executor ruined on pretence of a *devastavit*.

The proceeding by way of information for debt in the case of the Crown was introduced by Sir *Edward Northey* when Attorney General; for before the informations used to be founded on the statute; but if such proceedings be likewise carried on in the case of executors, it must be much more mischievous, especially in cases of this nature, where the matter charged is a personal tort done by the importer, whose offence dies with his person; and therefore in all cases of penalty, forfeiture or wrong committed or done by any person, no action lies for it against his executor. (a) Action lies not against executors on Stat. 2 & 3 *Edw. 6. c. 13.* for not setting out tithes. (1)

(a) 1 Sid. 88.
1 Keb. 344-
S. C.
1 Sid. 181. 407.

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If the tenant be amerced in the manor court, and die before it be levied, the amercement is lost. (2)

Cro. Eliz. 557.
9 Co. 87. b.

Debt lies not against executors where the testator might have waged his law.

Cro. Eliz. 557.
600.
1 Ld. Raym.
248. cont.
1 Salk. 69.
S. C.

Nor upon an award made upon a submission by the testator to a reference, although the award be in writing.

And no instance or precedent can be shewn, where such an information was maintainable against an executor.

The Attorney and Solicitor General *e contra* insisted, that the statute 12 *Car. 2. c. 4.* grants to the King the duties of tonnage and poundage, *viz.* so much *per ton* on all wines im-

(1) The executor of the parson is not entitled to the forfeiture given by the statute. 1 *Vern. 60.*

(2) The reason is because the tenant might have waged his law, the manor court not being a court of re-

cord. In an action of debt for a fine or an amercement, in a leet the defendant shall not wage his law, because the leet is a court of record. Co. Lit. 295. a. Moore 276. 2 *Roll. Abr. 106.* 1 *Leon. 203.* 2 *Lev. 106.*

ported,

ported, &c. so that it is a duty for which the King may have debt, and the subsequent acts which augment the duty are worded in the same manner. The statute 4 & 5 W. & M. c. 5. for further supply, &c. gives and grants to the King the additional rates, impositions, duties, viz. for every gallon of brandy imported, &c. two shillings. Now wherever the common law or custom creates a duty, debt lies for it; per *Hale, Hard.* 486. And it must be the same where an act of parliament creates a duty; when a statute enacts any thing for the advantage of another, the person will have a remedy given him by the same statute; per *Holt C. J.* 6 *Mod.* 26. Thus on the stat. 28 *Eliz. c. 4.* the sheriff may have debt for his fees, *Mo.* 853 (a). 1 *Salk.* 209. and on the statute 2 & 3 *Edw. 6. c. 13 (b).* for not setting out tithes; on the stat. 14 *H. 8. c. 5 (c).* for the practice of physic in *London* without licence, though no such action is expressly given.

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Cro. Car. 540.

(a) 1 *Roll. Rep.*
404. S. C.
Litch. 17. 51.
1 *Roll. Abr.* 598.
l. 35.
1 *Salk.* 331.
(b) 1 *Roll. Abr.*
598. l. 30.
2 *Inf.* 650. (c) 1 *Roll. Abr.* 598. l. 25.

But it was chiefly objected, that by the proviso in the stat. 4 & 5 W. & M. c. 5. s. 8. if brandy be imported in casks under 60 gallons each, it is forfeited, and then the action is not to be maintained for the duty. To which it was answered by Mr. Attorney, that this prohibitory clause does not extinguish the duty, but the King may take advantage of either as he pleases. It will not be said, because by the stat. 1 *Anne c. 14.* it is enacted, if any import or land goods, &c. before duty paid or secured, or be aiding, &c. he shall forfeit the goods and double the value, that therefore the King can have no remedy for the duties. And what difference, when such forfeiture is given in the same or some other act? And as to what was said that the King should make his election in the life of the party, no case is cited to warrant it; in debt or *Assumpsit* the executor may elect either, as well as the testator.

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Hale cited 2 *Mod.* 128. which saith, if in an act of parliament there be a prohibitory clause, and another which gives a penalty, an information lies on the prohibitory clause, and

2 *Hale's P. C.*
p. 172.

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and the party may decline to proceed for the penalty. Debt was brought by the farmers of the customs on the stat. 1 Jac. c. 33. for the duty of poundage for goods landed without paying the customs, 1 Rol. Rep. 383; so upon this very statute, 4 & 5 W. & M. c. 5. it hath been held in this court that debt lies for the duties.

Chamberlain and Hobbs.

(a) Banb. 44-

And again (a) *Doe qui tam v. Cooper*, 2 Geo.

As to the second point, on which the most stress seems to be laid, it must be admitted that in all cases where money becomes due by contract or agreement with the testator, an action is maintainable on such contract against the executor, unless where the testator could wage his law; so where the money grows due upon a default or misdemeanor, if reduced to a certainty by a matter of record, &c. as for issues forfeited by the testator, or fine on him by Justices at *Westminster*, assises, quarter sessions, commissioners of sewers, bankrupts, or stewards of leets, &c. *Offic. Ex'* 118 (3).

Off. Ex. p. 147.

It is true no action lies against an executor or administrator for any personal wrong or injury to the person, lands, or goods of another, as trespass, battery, false imprisonment, waste, &c.

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Nor upon a statute which gives remedy by debt against the testator himself for his misdemeanour, as debt for an escape, for not setting out tithes, &c. 41 Aff. 15. *Dyer* 322 (b). 2 Inst. 382. *Off. Ex'* 128.

(b) *Dyer*, 271.
1 Rol. Abr. 921.
Cro. Car. 539.
1 Saund. 218.

But the law gives further remedy against executors in the case of the Crown, than in the case of a common person; for as by the common law the king had his remedy for any thing due to him against the person, land and goods of his debtor, 3 Co.

(3) The edition of *Wentworth's Executors*, printed in 1774, is throughout referred to.

12. *b.* 2 *Inst.* 19. *Godb.* 290. &c. so if his debtor died, he might pursue his remedy against his heir or executor. 2 *Rol. Abr.* 162. And he might oblige the executor to give security for the King's debt before he administered. 2 *Rol.* 158. *l.* 45. So the King might have his remedy against the executor for debt on simple contract, for the executor could not wage his law against the Crown. *Co. Lit.* 295. 9 *Co.* 88.

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Palm. 167.
2 *Rol. Rep.* 295.

Godb. 291.
4 *Co.* 95. *b.*

So by the King, account lay against the executor of his account, though not in the case of a common person for want of privity, till the statute (a) 4 & 5 *Anne*, c. 16. *R.* 11 *Co.* 90. 2 *Rol.* 161.

Godb. 295.

(a) *St. 4 Ann.*
c. 16. *l.* 27.

Sowhere the testator was chargeable only to the King as an intruder, trespasser for waste, or other matter that is of profit or value, although not for a mere personal wrong. *Sav.* 40.

So for the duty of prisage wines, *per* 4 *Inst.* 30. 3 *Bulst* 1. (b) 1 *Rol. Rep.* 145.

(b) *Moor*, 812.
Hard. 301. *S. C.*
Dav. 8.
4 *Com. Dig.* 447.

And as to the inconvenience to executors or administrators, in case an information be brought against them after they have paid away all their assets to satisfy other debts, it seems not greater than what in all cases they must submit to, they must take the best care they can, not to pay debts of an inferior before those of a superior nature.

It is true that the King must be first satisfied debts on record, as judgments, statutes, recognizances, and it would be a *devastavit* in the executor to pay other debts before him; so obligations to the King, for they are of the nature of a statute staple, by statute 33 *H.* 8. c. 30 (c). 1 *And.* 129. So debts for fines or amercements in the King's courts of record. *Off. Ex'* 136.

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2 *Inst.* 32.

(c) *Moor* 193.
2 *Browl.* 203.
S. C.

But debts due to the King which are not of record seem not necessary to be satisfied before debts due to other persons,

Hardr. 27.
Park. 261.

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where there is no notice given of the King's debt ; as where money is due to the King for wood, tin, estrays, &c. or for amercements in court baron, or other court not of record. *Off. Ex.* 134. 2 *Rol.* 159. *pl.* 8. So debt for arrears of rent from the King's lessee. *Off. Ex.* 135. Or due to a person attaint or outlawed, if not found by office. *Off. Ex.* 134. So if in debt on a bond the defendant be outlawed before judgment till actual seizure, this debt need not be first paid. 1 *Salk.* 80. Or if debt be assigned to the King. *Lane* 65.

And by the opinion of three barons judgment was given for the King. *Thompson contra* (4).

(4) Lord *Mansfield* declares in the case of *Hambly v. Trott*, reported by *Cowper*, p. 376. that "so far as the tort itself goes, an executor shall not be liable ; and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable ; but so far as the act of

the offender is beneficial, his assets ought to be answerable ; and his executor therefore shall be charged."—The present case certainly falls within this rule, the testator's act having been beneficial to his property, therefore his personal representatives are responsible.

Term. Sanct. Mich.

7 Geo. II. In Scacc'.

Lord Viscount Falkland *vers.* Phipps.

Case 202.

THIS was an action of *Scandalum Magnatum* brought by *Lucius Charles* Lord Viscount *Falkland*, as one of the peers of *Great Britain*, against *Nathaniel Phipps*, butcher, for these words, *Go fetch your lord out, G—d d—n him, I will kill him, he is a villain and a villainous rogue*; and for other words, *He is a scrub and scoundrel*, to the damage of 5000*l.* Defendant pleads not guilty. Verdict for plaintiff. Damage 50*l.*

Peers of Scotland after the Union shall be intitled to an action of *Scandalum Magnatum*.

But it was insisted on the trial, and reserved for consideration, that the plaintiff ought to prove himself a Peer. *Sed non allocatur*; for the plaintiff in his declaration gives himself that denomination, Lord Viscount *Falkland*, one of the Peers of *Great Britain*, and if he was not so, the defendant should have pleaded the misnomer; but by the plea in bar he admits the plaintiff to be what he calls himself.

Cio. Car. 136.

2. That the plaintiff being only a Peer of *Scotland* was not intitled to an action of *Scandalum Magnatum* on the statute 2 R. 2. c. 5. unless he had been a Peer of Parliament, for the precedents of actions of this nature are *vocem & locum in parlamento habend.* *Vid. Ent.* 72. 74.

2 Inst.
Cler. 24. 27.

Sed non allocatur; for by the statute of Union, 5 Anne, c. 8. Art. 23. all Peers of *Scotland* after the Union shall be Peers of

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Great Britain, and have rank and precedence, &c. be tried, &c. and enjoy all privileges of Peers as fully as the Peers of *England* now do, or hereafter may enjoy, except the right and privilege of sitting in the House of Lords and the privileges depending thereon, and particularly the right of sitting upon the trial of Peers.

Now the statute 2 R. 2. c. 5. or 12 R. 2. c. 11. does not confine the remedy thereby given for speaking false news, lies, or other false things, to words spoken only against the Peers of Parliament, but extends to false words against other Nobles or great men of the Realm; and therefore when the Peers of *Scotland* are by act of Parliament made Peers of *England* or *Great Britain*, they are Nobles of the Realm. There (a) was no Viscount at the time of the statute 2 R. 2. the first Viscount being *John Beaumont*, who was created Viscount in the 18th of H. 6. yet when created Noble, though by a new title, he was intitled to his action on this statute. (1)

(a) Cro. Car.
136.
Ley. 82.
Palm. 565. S.C.

And though some precedents may add *vocem & locum in parliamento haberi*. this is not necessary for the maintenance of the action, and several precedents omit them, as *Hern. Pl.* 200, 201. 2 *Bro.* 16. *Brownl. Red.* 21. So *Vid. Ent.* 61. 63 (2).

Raft. Ent. 593.
Hern. Pl. 112.
246.
2 Inst. Cler. 28.
Lilly's Ent. 494.

(1) So a Baron of the Exchequer is entitled to this action, though the statute only mentions *Justices of the one Bench or the other*: *Palm.* 565. *Semb.* 12 Co. 134.

(2) It is determined in the case of

Lord *Mordington*, reported in *Fortescue*, p. 165. that a *Scot. b* Peer since the Union is equally entitled to privilege from arrest with any *English* Peer.

Cafe of Kennet Lord Duffus. In the Houfe of Lords. Cafe 203.

BY the stat. 1 Geo. c. 42. it was enacted, that whereas *George Earl of Marifchal, Kennet Lord Duffus*, and feveral others to the number of 50, did on or before the 13th of *November 1715*, in a traitorous manner levy war, &c. and are fled to avoid profecution, &c. if they render not themfelves to one of his majefty's juftices of the peace on or before the laft day of *June 1716*, every of them not rendering himfelf as aforefaid, fhall from the faid 13th day of *November 1715*, ftand and be adjudged attainted of high treason, &c.

When the legiflature puts terms upon an offender, no inferior court can hold any other terms to be an equivalent.

Lord Duffus on the 15th of *May 1716*, wrote to *Sir Cyril Wyche*, defiring to throw himfelf at his Majefty's feet, and to make a vifit to him (*Sir Cyril*) for that purpofe; and did fo at *Hamburgh*, where *Sir Cyril* was then refident as a public Minifter for the King.

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On the 2d of *June 1716*, he fet out for *England* by fhip from —, and came to *Hamburgh*, where on the 29th day of *June* he was feized and taken into cuftody about — o'clock in the evening, and was afterwards fent into *England*, and committed to the *Tower*, but pardoned by King *George*.

Upon this cafe *Lord Duffus* petitioned the King, who referred it to the Houfe of Lords, that his Peerage might be allowed. And it was infifted by his counfel at the bar of the Houfe of Lords, that *Kennet Lord Duffus* his father was not attainted by this act of parliament, fince he was minded to render himfelf, and coming into *England* for that purpofe, was prevented by the King's Minifter abroad, who feized and detained him at *Hamburgh*, whence he was ready to fet fail for *England*, in order to render himfelf there to a juftice of the peace, according to the direction of the act of parliament.

Lord Duffus's
Case,

That he had an intention to render himself according to the act, appears by his application to the King's Minister for that purpose on the 15th of *May*; and accordingly he set out on the 2d of *June* 1716, in order to come to *England*, and had arrived as far as *Hamburgh* on his journey, when he was seized by the King's Minister there, which was the same as if he had been taken into custody by the King himself; whereby his render was prevented, and made impossible by the act of the Crown, of which no advantage ought to be taken.

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And by law, it was urged, it is a sufficient performance of a condition if it be performed in substance, although every circumstance is not pursued; and in this case, although he could not render himself to a justice of the peace, yet he had rendered himself to one of the King's Ministers, and was afterwards sent over, and might have been tried; which was all the design and end of the act of parliament; and consequently the substance of the condition required by the act of parliament having been complied with, it was sufficient to prevent the Attainder from taking effect. Suppose he had rendered himself to one lately put out of the commission of the Peace, of which he had received no notice, would not the act have been sufficiently complied with? And many other cases might be put, where it would be extremely hard that the party should not be excused, since it would be equivalent to a literal performance of the condition.

Secondly, it was said, that in all cases where the condition becomes impossible to be performed by the act of God, or of the Law, or by the act of the King, or of the person on whose behalf the condition was made, the condition is dispensed with, and need not be performed: and therefore in this case, when the Lord *Duffus* was taken into custody by the King's Minister, which was the act of the King, it was impossible for him to come into *England*, and render himself to a justice of the peace.

And it being objected, that his intention to render himself was not very evident, since his application by letter to Sir *Cyril Wyche* at *Hamburgh* was the 15th of *May*, but he took not ship

ship till the 2d of *June*, and was no further than *Hamburg* on the 29th of *June*, whence it was from the evening of that day impossible to come into *England* time enough to render himself to a justice of the peace on the last of *June*, which was the next day; a witness was produced, who said it was possible to come from *Hamburg* to *England* in the time, since it was but — leagues, and with a good wind a person might sail — leagues in an hour.

Lord Duffus's
Case.

But taking it for granted, that the Lord *Duffus* meant to render himself, and might come from *Hamburg* to *England* time enough, yet there being a positive act of parliament, which made every person attain that did not render himself to a justice of the peace by such a day, it must be strictly complied with; and the non-performance could not be dispensed with by any inferior Judge or Court, or by any authority but that which made the act of parliament.

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And this matter of law was referred to the opinion of the Judges present, who were the chief justice *Eyre* and myself; and we were of opinion, that this was not a compliance with the act of parliament; nor could any inferior court, if the Lord *Duffus* had been arraigned before them, construe it so to be; for all he could say for himself had been, that he had surrendered himself according to the act; which fact, if it had come to be tried, must have been determined by a jury, who upon this evidence could not justly say, that he did render himself to a justice of the peace as the act directs; or if they had found the matter specially, the court could not adjudge it to be a render according to the intent of the act; for the Legislature may put upon an offender what terms it pleases, nor can an inferior court hold any other terms to be equivalent to them; that must be the act of the Legislature itself.

And I mentioned the case *M. 8 H. 4. 12.* which was this: Sir *Thomas Brooks* coming to the parliament 5 *H. 4.* one *John Savage* fell upon *Richard Chedder* his servant, who was attending him, and having grievously wounded him he fled, upon which *de advisamento procerum ad requisitionem com-*

Rlt. on Par.
Edit. 1768.
p. 189.

Lord Durrus's
Case.

munitat. ordinatum fuit 18 Mart. in dicto parlamento, that proclamation should be made at the place where the fact was done, and if *John Savage* did not render himself to the Justice of the *King's Bench* within a quarter of a year after, he should be convicted of the offence, and pay double damages to the party.

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Proclamation was made in *Easter Term*, 5 H. 4. and he not rendering himself within the time, a *Capias* was awarded against *Savage* returnable *M. 6 H. 4.* and he not appearing, *Chedder* sued for the double damages; and *Savage* in bar said, that he had rendered himself to the King at *Pomfret* within the time, in the presence of the Bishop of *Ely*, then Lord Chancellor; and the King committed him to the custody of the Duke of *Lancaster*, Lord Steward; whereby he could not render himself to the Justice of the *King's Bench*; but the court said, that the order of parliament could not be varied by any inferior court; therefore his surrender of himself to the King, since he did not render himself to the Justice, as the proclamation required, was of no avail.

Talbot Lord Chancellor, and Lord *Hardwicke*, approved the opinion, and the Lords rejected the petition.

Case 204.

Case of John Pitt, Esq. In Serjeant's Inn.

How far privilege of parliament after dissolution shall be extended.
Fort. 159.
2 Barnard. 422.
433.
2 Str. 985.
Cas. Temp.
H. r. l. w. 28.
Cunn. 16. S. C.
Tid. Pr. 20. 45.

THE case referred to the consideration of the Judges assembled at *Serjeants Inn* was thus: *John Pitt* was Burgess in parliament for the Borough of *Camelford*, and on the 17th of *May* 1734, the parliament was prorogued by the King to the — of *June* next, and on the ensuing day, viz. the 18th of *May*, it was dissolved by proclamation.

1. The first question was, if *John Pitt* was intitled to the privilege after the dissolution? And it was agreed by all the Judges, that Members of Parliament have title to the privilege *eundo, morando, & redeundo*. Appendix to R^g. 1. A writ for the Abbot of *Malton* against those who had arrested him in his

Raft. Ent. 664.

his return home, recited, that whereas the Nobles in going to parliament and staying there, and returning from thence, &c. A citizen of *Exeter* being condemned on several informations in the *Exchequer* during the sessions of parliament, 17 Ed. 4. an act was made that he should have as many *Superfedeas's* till he should come home. In *Cotton's Records*, p. 704. it was said, that the Commons claim privilege forty days before and forty days after every session; but the Commons never have ascertained the time of their privilege.

PITT'S CASE.

 ELS. ON PAR.
P. 245.

Although it was declared by the Chancellor, upon consultation of the Lords, that Peers have only twenty days before and after each session, and that their privilege commences from the date of the writ of summons (a). 2 *Lev.* 72.

 (a) 1 Ch. Caf.
220.

So the privilege of a Burgess begins but at his election; for if he be arrested before, he shall not have privilege. *Mo.* 340.

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 ELS. ON PARL.
P. 243.

Second question, how long the privilege continued? It was said, that the Lords have determined their privilege to have continuance for twenty days before the beginning, and twenty after the ending of the session; but the Commons claim forty days. 2 *Lev.* 72. as before.

 1 Brownl. 97.
1 Bl. Com. 265.
1 Sid. 29. cont.

But all the Judges seemed to think that the Commons ought to have a reasonable time before and after the session, but what time was reasonable never had been by them expressly determined; yet this arrest seemed too hasty, and within the time that ought to be allowed for his return.

The third question was, how advantage shall be taken of the privilege? And it appeared to several that he ought to plead, or at least to sue a writ of privilege, before the Court can take notice that he is intitled to it. But after consideration, it was agreed by ten Judges, that although a writ of privilege was more proper before the stat. 12 & 13 W. 3. c. 3. yet after this statute no plea of privilege could be well pleaded, for such plea concludes *fi curia cognoscere velit*.

 Tidd's Pr. 54.
1 Wils. 278.

But

Patt's Case.

But by this act it was enacted, that if any have cause of action against any of the knights, citizens, or burgeses, or other person intitled to privilege of parliament, he may prosecute, &c. by summons and distress infinite, or by original bill and summons, as attachment and distress infinite, &c. provided the act extend not to subject the person of any intitled to privilege of parliament to be arrested during the time of privilege; and therefore no plea can be to the suit, but only to the manner of proceeding; but a plea was never known to process, for irregularity of the process is aided by the appearance of the party, and each plea shall go to the writ or action as to a bill or plaint; but the bill here is well.

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And therefore being only an irregularity against this act (which is a public act, and expressly provides that no persons intitled, &c. be arrested during time of privilege) it seems reasonable that it shall be remedied by the Court upon motion, and due proof of the fact by Affidavit; as if one arrested the servant of an Ambassador contrary to the statute (a) 7 *Annæ*, or upon a *Sunday* against the statute (b) 29 *Car.* or in other cases of privilege, as when a (c) juror or witness, or the plaintiff himself be arrested in going to, or returning from the court, which are all discharged upon motion; and by Lord *Hardwicke*, Chief Justice, a writ of privilege was not here usual, only where privilege was pleaded.

- (a) St. 7 Ann.
c. 12.
(b) St. 29.
Car. 2. c. 7.
s. 6.
(c) *Supra*, p.
412.

Case 205.

Dame Dorothy Blunt *vers.* Japhet Crook and Thomas Hawkins. Before the Delegates.

Where parties are dissatisfied with what two delegates do in *actis ordinariis*, such as settling allegations, &c. the matter may be brought under the consideration of the delegates.

ON an appeal to the Delegates; the case was, that *John Hawkins* made his will in favour of the appellant his niece, and afterwards made another will, as pretended, in favour of *Japhet Crook* and *Thomas Hawkins*; and a libel was exhibited to discover the fraudulent contrivances of *Crook* to obtain the last, and to set it aside and establish the first will. *Crook* made an evasive and insufficient answer, to which excep-
tions

tions were taken, but over-ruled by the Judge of the Prerogative Court, and thereupon an appeal to the Delegates.

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CROOK and
Another.

The Delegates reverse the former decree, and retain the cause, and order *Crook* to answer *de novo*, who puts in another evasive answer, upon which the appellant, before sight of any depositions, gives in further allegations to explain facts which *Crook* had not clearly answered, and containing facts discovered pending the suit. In *Trinity* Term these allegations were rejected by two of the Delegates at *Doctors Commons*, on which the appellant applied that the matter might be reheard before all the Delegates.

But it was objected, that no such rehearing was ever allowed; that the Delegates are all in equal authority, and their meeting at *Doctors Commons* makes as much a session as at *Serjeants Inn*, and the other Delegates might have been present if they had pleased. That by the Commission the Delegates are authorised so that *in actis ordinariis duo, in sententia definitiva quinque concurrant*, so that the determination by two in this matter, which is an ordinary act, is final and conclusive.

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On the other side it was insisted, and so determined by the Delegates, that, admitting generally, two of the Delegates may settle the allegations, upon which the proofs in the cause may be taken; and this may be well, if all the parties acquiesce in what they think proper; but if the parties are dissatisfied with it, it will be hard to bind them down to what two shall determine, which would in its consequences be to make them entire Judges of the cause; for if they rejected all the allegations which one side thought most material, the other Delegates could have no other evidence before them, on which they could form a judgment, but such as the two Delegates admitted.

It seems fitting therefore, that where the parties are dissatisfied with what the two Delegates have done, that the matter may be brought under the consideration of the Condelegates; which is not to bring an appeal or writ of error on their judgment,

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judgment; as is insinuated, before others that are but co-ordinate in authority with them; but it may be better compared to a court's reviewing or re-considering the act of one of themselves, or their own act; as where matters of order or regularity are settled by a Judge at his chamber, or in court, when but one or two there, it is frequent to draw it into examination again, when the court is full; and this may be more proper, where allegations are admitted, than when rejected improperly.

Term. Sanct. Trin.

8 Geo. II.

Rushworth *vers.* Mason and others, Inhabitants
of *Coventry*. Before the Delegates. Case 206.

ON an appeal to the Delegates, the case appeared to be, that on the 16th day of *July* 1733, *John Rushworth* was elected by the mayor and common council of *Coventry* to be usher of the grammar school at *Coventry*; but it being required by canon 77. made *anno* 1603, that none teach school without licence from the Bishop of his Diocese, on the 3d of *October* 1733, a *Caveat* was entered with the register of the Bishop against his obtaining such licence.

Where articles in the spiritual court are declared null, parties may object below again originally.

On the 23d of *October*, the *Caveator*, he that entered the *Caveat*, was called to know what he had to object against the granting of such licence, and the proctors on each side exhibited their proxies in the consistory court of the Bishop of *Litchfield* and *Coventry*. *Hand* for *Rushworth* the appellant, and *Fletcher* for *George Mason*, *Nath. Alfop* and *W. Grove*, three inhabitants of *Coventry*, who prayed time to exhibit articles; and a day is assigned for that purpose.

On the 26th of *October*, articles are exhibited, but no title or head to them, and no prayer annexed.

On the 6th of *November*, *Hand* prays articles to be dismissed, and day is given to consider them.

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v. MASON.

On the 20th of *November*, four of the sixteen articles are admitted.

Viz. The third, for soliciting the chastity of a woman.

The 10th, That he was passionate, and pulled his mother out of bed.

The 11th, That he beat his wife inhumanly after the Sacrament, &c.

The 12th, That being vicar of *Filongly* he beat his servant, &c.

And the 13th article, which was for exacting subscriptions, and abusing his parishioners by ill language, threats, striking, &c. ordered to be reformed.

On the 4th of *December*, nineteen additional articles were given in, which were admitted on the 11th of *December*.

Upon this *Rushworth* appeals to the Court of the Arches in *querela nullitatis*, for the four articles admitted, and prays that the *thirteenth*, which was ordered to be reformed, should be rejected.

On the 29th of *April* 1734, the appeal was considered and adjourned.

On the 7th of *May*, Dr. *Bettesworth*, Dean of the Arches, rejects the *querela nullitatis*, orders the head or title of the articles to be reformed, and the prayer to be extended, and the *thirteenth* to be farther reformed.

From this sentence of the Dean of the Arches the appeal is now to the Delegates.

It was insisted for the appellant by Serjeant *Birch*, Doctor *Andrew*, and Doctor *Cottrell*,

1. That *Mason*, *Alfop*, and *Grove*, being inhabitants of *Coventry*, are no proper persons to complain of acts done by the corporate

corporate body; for they are concluded by their determination, otherwise a minority may defeat an act of the majority.

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2. That it was improper to proceed in this manner; for upon the Caveator's being summoned to shew what objection he had against the Bishop's giving a licence, they should have proceeded in a summary way, not by way of libel and article.

3. That on the appeal the court could not reform the head of the articles, which is to make a new cause, nor extend the prayer, which is to vary intirely the nature of the proceeding; the proceeding was in a criminal way, it is now altered to a civil cause.

4. That if this could be done, it could not be after sentence for the admission of the articles.

5. That the articles are foreign to the matter complained of, which charge him with misdemeanors in his spiritual function of Vicar, when the matter was only whether he should have a licence to teach school.

6. It is not too late to insist on this matter, for we say there was a nullity in the proceeding, which may be objected at any time after an appeal allowed, and after thirty years, &c.

And all the articles and proceedings from the beginning were declared to be null, and the parties, it was declared, might object below originally, if they had any thing to object against the party's being licensed to teach school as an usher.

2 Str. 1023.
2 Barnard. 365.
428.
3 Burn's E. L.
R. 313.

Cafe 207. William Limbery *vers.* Samuel Mafon and
Henry Hyde. Before the Delegates.

A will fufficient
to pafs a perfonal
eftate will not amount to a
good revocation
of a former will,
whereby the real
eftate is devifed
according to the
ftatute of frauds.
2 Eq. Abr.
776. pl. 24.
Vin. Abr. Tit.
Devife, (R. 2.)
pl. 17.
4 Burr. 2515.

UPON a Commiffion of Review after an appeal to the Delegates where the fentence below was affirmed, the cafe appeared to be this: *Samuel Mafon* made his will, dated the 23d of *June* 1729, marked letter *A.* whereby he devifed his real and perfonal eftate, and made *Mafon* and *Limbery* his executors, and made a duplicate of it marked *B.* which he left with *Limbery*, one of his executors, and left likewise a letter with him, fhewing where his perfonal eftate was.

In *July* 1730, Mr. *Mafon* told *Hyde* that he had made his will, but not to his mind; but he would make a new one, and his fon executor, if he would accept of it.

In *Auguft* 1730, Mr. *Hyde* telling him that he had fpoken to his fon, who would accept to be executor, he faid he would then go about it as foon as he could.

The part of his former will in his own cuftody marked *A.* he obliterates in many places and many lines together, and makes interlineations with his own hand, but did not tear off his feal or otherwife cancel it, but foon wrote over the paper *C. D. E.* with his own hand, which was in the main agreeable to the paper *A.* fo blotted and interlined, but not exactly agreeable, there being fome additions and alterations to what he had there interlined; and on the 25th of *September* 1730, he told *Hyde* that he had written his will with his own hand, and when he had finifhed it he would fhew it him; but he never did fhew it him, dying on the 2d of *October* 1730, and leaving the paper *C. D. E.* in loofe fheets without being figned or fealed by him; and alfo leaving a paper *F. G.* which he had begun, and which feems as if he had intended it to be a duplicate of *C. D. E.*; under the paper *C. D. E.* was written by him in witnefs whereof I have hereto and a duplicate thereof fet my hand and feal, though no hand or feal was put, nor duplicate written.

On

On this Case two points were made.

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MASON.

First, Whether the paper *C. D. E.* was a good will, at least as to the personal estate.

Secondly, If not a will sufficient to pass the personal estate, if it amounted to a good revocation of the first will, so that he died intestate.

And it was insisted, that it was a good will of the personal estate, which needs not the same solemnities that are requisite to a will of land; it need not be sealed, it needs no witnesses, if the testator write it for his will it is sufficient. In the case of *Worlich and Pollet*, anno 1711, *Mary Pollet* sent for a person to make her will, gave him instructions to do so; when he had written it he read it to her, she approved of it, declared it to be her last will, sent for witnesses to see her execute it, *signed and sealed* was written, but she died before any other execution, yet it was held a good will; for though the first sentence for it was reversed upon an appeal, yet it was afterwards affirmed before the Delegates.

So in the case of *Wright and Walthoe*, three testamentary schedules, whereof one was without date; the second was written *in witness*, but no witness; the third concluded abruptly, yet being written by *Richard Helman*, they were declared to be his will, *March 1710*.

So in the case of *Loveday and Claridge 1730*, *Loveday* intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draught which he intended afterwards to finish, for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to pay to Sir — *Hankey* a dividend of stocks, yet it was held a will.

So in a case where the testator gave instructions to make his will of his real and personal estate, and when it was brought to him he made several alterations, and then wrote

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2 Eq. Abr. 761.
Pl. 4.

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the whole over as altered with his own hand ; this found in his study, though not signed or sealed, was holden a good will. It is true, the first sentence was, that he died intestate ; but that was reversed by the Delegates on the 18th of July 1704.

So in the case of *Brown and Heath and Pocklington*, 1721, a will of real and personal estate was prepared in order to be executed, though several blanks in it, and the testator died before execution ; yet it was held a good will for the personal estate.

2 P. Wms. p.
544.

And though more was intended to be done, yet it shall stand good for what is done ; as in *Butler and Baker's case*, 3 Co. 25. if a will be partly written in the testator's life, though more was intended to be written, it shall be good as far as was written.

Then as to the second point, it was insisted, that this paper *C. D. E.* whether a subsisting will or not, was a revocation of the former will *A.* If it was a good will, there could be no doubt but it was a revocation ; but if not sufficient to substantiate the devise, yet it might be sufficient to revoke the former. A testamentary will is sufficient to revoke a will solemnly executed, though it hath not the like solemnities (1). *Vinnius*, l. 2. tit. 17. §. 7. ff. 379, 380.

By

(1) This assertion must be taken with much restriction ; for the reverse of the proposition is, generally speaking, true. The law upon this subject is laid down in the following words : " Cautum sit, ne alias tabulæ priores jure factæ, irritæ fiant, nisi sequentes jure ordinatæ & perfectæ fuerint ; nam imperfectum testamentum, sine dubio, nullum est." Inst. lib. 2. tit. 17. So again, " Tunc autem prius testamentum rumpitur, cum posterius rite perfectum est." Dig. lib. 28. tit. 3. l. 2. So stands the general law upon the subject ; but there are exceptions to this rule, and these exceptions must

have been alluded to by our Author in his text. They are thus explained in the remainder of the same passage, which I have already quoted from the Pandects : " Nisi forte posterius, vel jure militari sit factum, vel in eo scriptus est qui ab intestato venire potest ; tunc enim et posteriore non perfecto superius rumpitur." Vinnius, commenting upon this subject, says, " Ab hac tamen regulâ (viz. ut posteriores jure ordinatæ & perfectæ sint) excipienda sunt ea testamenta, quæ quamvis imperfecta, jure tamen singulari valent, ut testamenta militum & parentum inter liberos. Testamentum

By the statute 29 Car. 2. (a) a former will may be revoked by an obliteration made by the testator himself; and this is so; the testator obliterated that part *A.* and the cancelling of one part is a cancelling of the duplicate; so it was holden in Sir *Edward Seymour's* case, who died on the 18th of February 1708. A little before his death he sent for his will out of his scrutore in the presence of several persons, cancelled it, and said, *I cancel my will*, and desired them to bear witness of it; and on the next day told his physician, that he was hot in his body, but easy at his heart; and this was looked upon as a sufficient cancelling of the other duplicate that he had not by him.

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MASON.
(a) St. 29 Car. 2.
c. 3. sec. 6.
1 P. Wms. 346.
2 Vern. 742.
Cowp. 50.

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But on the other side it was argued, that the paper *C. D. E.* in this case did not amount to a will sufficient to give the personal estate, nor did it amount to a revocation of the former will.

It was agreed, that in case the will marked *A.* had been completely cancelled, the duplicate had been thereby likewise revoked.

It was agreed by most, that the paper *C. D. E.* might have amounted to a good will of the personal estate, if there had been no former will (although Judge *Page*, one of the Delegates, doubted of that). But the matter now to be considered was, whether this paper, not being a complete will to pass his estate, as it was intended to be, should amount to a revocation of his former will, which was completely executed. And it was said, that upon all the circumstances of the case, it did not appear to be the intention of the testator to die in-

tum factum jure militiæ inter imperfecta numeratur; atque ideo etiam imperfectum, quovis posteriore solvitur; et tamen per id quod jure militari secundo loco factum est rumpitur præcedens perfectum, hoc est, factum jure communi. Testamentum imperfectum factum a parente inter liberos, & ipsum

non minus ex privilegio valet, quam militis. Quare si pater, qui testamentum prius jure fecerat, postea aliud fecerit inter liberos, quamvis posterius hoc imperfectum fuerit, tamen rumpitur prius." Vin. Com. Lugdini, 1747, p. 436.

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testate ; but being willing to make some alterations of his former will, he was preparing the draught of another ; but it ought not to be presumed that the first was designed by him totally to cease till his other was finished. There is no doubt but the testator by any writing directly designed for that purpose, and executed as the statute 29 Car. 2. directs, or by any cancelling, obliteration, &c. designed merely to disannul the former will, might have revoked it without more, but he designs to do it by a new will ; and unless such writing be effectual to operate as a will, it shall not amount to a revocation.

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And this was agreeable to the rules of the civil law, as well as to the resolutions at common law made since the statute of Frauds. In the civil law the rule is laid down, *Tunc prius testamentum rumpitur cum posterius perfectum est, &c. Dig. lib. 28. tit. 3. l. 2.*

So *Mantuan.*

So *Vinnius.*

So *Swinburn.*

And *Domat. 2 part. lib. 3. tit. 1. l. 5. art. 3.* A first testament made in due form cannot be annulled by a second, unless the same be likewise made in due form.

It is true that a will may be revoked by a military will, which requires not the same solemnities in the execution which other wills have, but is executed in such due form as such a kind of will requires.

So at common law, in the case of *Edleston and Speak, 2 W. & M.* it was resolved that *Anne Speak* having made a second will, and signed it in the presence of three witnesses, yet they not having attested it in her presence, whereby it was not a will sufficient to dispose of her real estate, as intended by her, it was not a sufficient writing to revoke her former will, although it had all that was required by the statute 29 Car. 2.

to

to a writing of the revocation of a will (a). 1 *Show.* 89. *Carth.* 79.

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(a) 3 Mod. 258.
Comb. 156.

Holt, 222. S. C. 1 P. Wms. 344. *Proced.* in Ch. 459.

So in the case of *Hyde and Hyde (b)*, 6 *Anna*, 1 *Equi.* (b) 3 Ch. Rep. 155. *Ca.* 409. where a man having made and duly executed a will of his real and personal estate, had a mind to change a trustee, and make some alterations, and for that intent sent for a scrivener, gave him instructions for a new will, who drew up another will pursuant to them, read it over to the testator, by whom it was approved and signed, and who then took the old will out of his pocket, tore the seal from off eight sheets of it, but before he had torn off the seal from the 9th and last sheet, the scrivener asked what he did, the second was not yet perfected, and he died before it was so. And it was held that the last not being executed according to the statute 29 *Car.* 2. and consequently not sufficient to pass his real estate, was no revocation of the former will, and though the seals were torn off from eight of the sheets of the first will, in order to cancel it, yet that not being done with the intent of cancelling, unless the second will was good, should not amount to a cancelling.

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It is true the ecclesiastical court allowed the second will to be good for the personal estate, which the Chancellor could not controul.

So in the case of (c) *Onyon and Tryers, H.* 1716. 1 *Eq.* *Ca.* 408. 2 *Vern.* 741. the testator having a mind to alter the trustees to his former will, ordered it to be written over, signs it in the presence of three witnesses, then tears the seal from the former will, but the second not being attested in his presence, it was holden no revocation.

(c) *Proced.* in
Ch. 459.
Gilb. Rep. 130.
1 P. Wms. 343.
10 Mod. 467.

The case of (d) *Burkit and Burkitt*, 2 *Vern.* 498. is to the same effect; and all the Delegates but one concurred in that opinion, whereby the sentence of the former Delegates was affirmed.

(d) 1 *Eq. Abr.*
402. pl. 4.

Term. Sanct. Mich.

8 Geo. II. In Scacc'.

Cafe 208. Makepiece *vers*. John Leech Fletcher, and Others.

When the right of entry shall be tolled by descent and non-claim,

THIS was an action of ejectment on the demise of *John Lees* and *George Ridings*, on the 1st. of *July*, 4 *Geo.* 2. and upon another demise of *Thomas Illingworth*. Upon not guilty, a special verdict was found to the following effect: *Robert Weild* being seised in fee of the lands in question, by indenture, dated the 1st of *November*, 6 *Car.* 1. in consideration of his affection to his two daughters, *Anne* and *Mary*, and to the intent that his tenements should descend to them, and continue in his blood and progeny, covenanted to stand seised to the use of himself for life, and after his decease, to the use of the heirs male of his body; and in default of such issue, to the use of *Mary* his younger daughter, and the issue of her body, for the term of ninety-nine years, from the time of the death of the said *Robert Weild*; and in default of such issue, and at the end of such term, to the use of *Anne* his eldest daughter, and the issue of her body; and in default of such issue, to the use of *Helen* his other daughter, and the issue of her body; and in default, &c. to the use of the heirs male of *John Weild* his brother; and in default, &c. to the use of his sisters *Elizabeth Hall* and *Mary Woolmer*, and the issues of their bodies; and in default, &c. to the use of his right heirs,

Afterwards

Afterwards *Robert Wild* by his will, dated the 9th of *November*, 1630. devised, that his said tenements should be left and disposed to such uses, intents and purposes, as he had limited by the said indenture of the 1st of *November*, 1630, and died on the 13th of *April*, 1631, without issue male, but left his said three daughters *Anne*, *Mary* and *Helen*. MAKPIERCE
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On the 21st of *September*, 1641, *Anne* the eldest daughter married *Thomas Illingworth*, who at their death left *Robert Illingworth* their eldest son and heir, who had *Thomas Illingworth* his son and heir, who is one of the lessors, and died on the 11th of *October*, 1699.

On the 14th of *April*, 1631, after the death of the testator, *Mary* his younger daughter entered; and married *John Sandford* on the 18th of *February*, 1646; and died on the 7th of *November* 1667, leaving *John Sandford* her son and heir, who afterwards entered and was seised, and during his seisin *Robert Illingworth*, father of *Thomas Illingworth* the lessor, after the death of *Anne* and her husband, by his deed of the 13th of *October*, 1683, released all his right and estate in the premises to the said *John Sandford* and his heirs.

On the 5th of *May*, 1717, *John Sandford* the son died, having issue *John* and other issues, and *John* his son and heir entered and was seised; and by indentures dated the 16th and 17th of *September*, 1710. leased and released to *John Lees* the defendant and his heirs, upon which *Thomas Illingworth* the lessor, on the 15th of *April*, 1730. entered, and demised to the plaintiff; whereupon *John Lees*, and the other defendants by his direction, entered and ousted him. But whether they are guilty, or not, is submitted to the Court.

And it was insisted, that by the indenture of the 1st of *November*, 6 Car. 1. *Anne* the eldest daughter was tenant in tail, after the term of ninety-nine years given to *Mary* was expired, (which expired on the 13th of *April*, 1730.)

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and therefore upon the 15th of *April*, 1730. *Thomas Ellingworth* the lessor might well enter, as issue of the body of the said *Anne*, and make the lease to the plaintiff.

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It was admitted, that by conveyances at common law a limitation to *A.* and the issues of his body does not make *A.* a tenant in tail; that the word *heirs* is necessary to make an estate of inheritance; otherwise where a limitation is by way of a use; and therefore it is said, 1 *Co.* 100. b. That if a man has by bargain and sale conveyed his lands for monies paid to another before the Statute 27 *H.* 8. the bargainee should have a fee-simple without those words *his heirs*, which was warranted by the cases there cited; and in the case of *Lee v. Brace*, (a) *Carth.* 343. 5 *Mod.* 266. it was resolved that a conveyance by way of use shall be always construed as a will according to the intention of the parties, and shall not be confined to the strict rules of conveyances at common law; and therefore where *Walter Brace* makes feoffment to the use of himself for life, and afterwards to the use of *Thomas Brace* and his heirs for ever, and if *Thomas* dies without issue of his body, to the use of his right heirs, it was resolved (as before it was in the court of Common Pleas, 2 *W. & M.* in a case upon an action of ejectment there) that *Thomas* had only an estate-tail.

(a) 1 *Ld. Raym.* 301.

3 *Salk.* 337.
Holt 668.

Say. 63.

12 *Mod.* 101.
S. C.

Conveyances by way of use shall be construed according to the intentions of the parties, and not confined to the strict rules of conveyances as at common law.
3 *Atk.* 734.

2. It was insisted, That if *Anne* had not an estate-tail by the deed she would have it by the will of *Robert Weild*, who devised that his lands and tenements should be disposed of to such uses as he had limited and appointed by the said deed indented, dated the 6th of *November*, 1630, and this amounts to a disposition of the lands to the uses in the deed which is as much as if the uses were mentioned in his will; and if the devise was to *Anne* and the issues of her body, without doubt it would be an estate-tail in *Anne*; as where a man deviseth, *I will my younger children not married shall have such several annuities, as be expressed in several writings signed and sealed by me, according to the true meaning of the said writings*; it was resolved, That the will devising such

such rents as are mentioned in such writings was a good devise of the rents. So 1 *Salk.* 225. 1 *Show.* 356. (d) Where a man having by deed agreed to levy a fine to such uses, and afterwards by his will before a fine levied, deviseth all his lands granted by his settlement, and all estates, to his son according to the deed; it was agreed that the lands pass to the son to the uses in the deed.

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v. FLETCHER.
(d) 4 Mod. 131.
Comb. 195.
S. C.

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But it was argued *e contra*, That no estate-tail was given to *Anne* by the deed, but only for life, for the word *heirs* is necessary to make an estate of inheritance in gifts in tail, as well as in feoffments and grants. *Co. Lit.* 20. a. 2 *Inst.* 334. 1 *Roll.* 837. And the cases cited do not contradict it, for the case cited, 1 *Co.* 100. b. was before the Statute 27 H. 8. And the case of *Lee* and *Brace* makes the same construction of the word *heirs* in the charter of feoffment, as would be made in a will, where the word *heirs* was explained by the subsequent words for default of issue of his body, to be understood of the heirs of his body, and not of his heirs generally.

3 Com. Dig.
218.

And if by the deed *Anne* did not take an estate-tail, she could not take it by the will, for the testator deviseth nothing that was not granted by the deed, nor limits no new use or estate, only that which was limited by the deed, and therefore if *Anne* by the deed took only an estate for life, she shall not take a greater estate by the devise. It is true, where a deed is not effectual, and afterwards the testator by his will devises to the uses of the deed, the estate may pass by the will, though it shall not pass by the deed, as if the will devise with reference to a feoffment where no livery was, or to a bargain and sale where no inrollment was, or to a deed by which a fine is agreed to be levied to such uses, and no fine is levied, there the estate passes by the will, which has reference to the deed (as the case was 1 *Salk.* 225.) although it could not otherwise pass, but no other estate shall pass, only such as would

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would pass, if livery or inrollment had been made, or a fine levied.

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But if *Anne* was tenant in tail, *Thomas Illingworth* the lessor had no title of entry, for it is found by the verdict, that *John Sandford* after the death of his father and mother entered, and was seised of the tenements, and it is not found that he was executor, therefore it shall be intended that he was not; and his mother *Mary* having only a term of ninety-nine years, his entry not being as executor or administrator, was a disseisin; and when he afterwards, viz. on the 15th of *May*, 1717, died seised, and a descent was cast upon his son and heir, who continued five years in possession, without entry or claim by *Robert Illingworth*, or *Thomas Illingworth* the lessor, the entry of the lessor was tolled by the Statute (a) 32 H. 8. and by consequence before a recovery by a *Formedon* he could not make a demise, upon which an ejectment might be maintained. (1)

(a) St. 32
Hen. 8. c. 33.
Co. Lit. 238. a.
3 Bl. Com. 190.

And in *Hilary* term following it was argued by Serjeant *Chapple*, that the estate limited to *Helen* by indenture, dated the 6th of *November*, 6 Car. not being to commence till the death of *Anne* without issue, the estate was in the interim in the testator, and he by his will could make to *Anne* an estate-tail, although by the deed she had only an estate for life. But it was answered, that the will does not give any other estate, or limit other uses, only that which was limited by the deed, and if *Robert Weild* had the estate in the interim (he had it only as a use, and not to dispose of) which descended to his heirs, and the three daughters being his

(1) *Gilbert* in his *Law of Tenures*, relative to the present point says, "when any man is disseised, the disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has a right, and in this respect only can be said to have

the right of possession; for in respect to the disseisee he has no right at all. But when a descent is cast, the heir of the disseisor has *jus possessionis*, because the disseisee cannot enter upon his possession and evict him, but is put to his real action, because the freehold is cast upon the heir, p. 21.

heirs,

heirs, the part of *Anne* passed by the lease and release made by *Robert Illingworth* the father to the lessor. MARSHALL
v. FLETCHER.

And all the Court agreed, that *Anne* had not an estate-tail but for life only; and that if she had, the entry of *Thomas Illingworth* was barred by descent and non-claim.

Termino Pasch.

8 Geo. II. In Scacc'.

Case 209.

Naiß against the East-India Company.

It is not reasonable to decree a deposit back which is made by way of security to any one, where the person making it had a proper power and authority to make it.

THIS was a bill in equity against the *East-India Company* to account for 20,000*l.* and interest deposited in their hands by the plaintiff's wife. The case appeared to be this :

The plaintiff was appointed *supercargo* to four ships of the company bound for *China* ; and by articles between him and the company, dated the 6th of *November*, 1729, the company was to allow him 25 *per cent. per month* of the freight, &c. to allow him an adventure of 2000*l.* and to carry out any sum not exceeding 200*l.* for his own use.

By the same articles *Naiß* covenanted to be faithful to the company, and to perform the trust reposed in him ; to invest their treasure in goods, &c. to keep true books of accounts, and true journals, not to charge for goods that he bought, more than he paid, nor to set down for goods that he sold less prices than he sold them at, not to load or bring home any gold in his own name, or in the name of any other at any time during the voyage, &c.

That in 1731. by order of the company which sent out other ships, *Naiß* then in *China* was continued in their service as *supercargo*.

Naiß before his voyage made a general letter of attorney to his wife, dated the 20th of *November*, 1729. giving her authority

authority to receive, sue for, and discharge debts, to settle accounts, pay and disburse whatever sums she should think proper, and do every thing for him that he himself if present could do, &c.

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Naiß when in *China* sends home 300 pieces of gold, as appears by his own letter, dated at *Canton* the 10th of *December*, 1730. directed to Captain *Digby Dent*, to take them on board, and deliver them at *Erith*; and on the next day, as appears by letter, dated the 11th of *December*, 1730. sends sixty-four pieces of gold more.

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On the 6th of *July*, 1731. Mrs. *Naiß* receives this gold of Captain *Dent*, as appears by her receipt.

On the 14th of *July*, 1731. Mr. *Arbuthnot*, who was another *supercargo*, and was with Mr. *Naiß*, at *Canton* in *China*, gives information to a committee of the directors of the *East-India* company in writing, that Mr. *Naiß* had acted contrary to his trust and duty, and had set down greater prices for the tea and coffee which he bought than what he gave, &c. He exhibited a diary of his proceedings under his hand, said he could swear, that all he informed them was true, but could make no proof of them.

Upon this the Court of Directors took time to consider, and having likewise been informed of the gold brought over on the 13th of *August*, 1731. they came to several resolutions.

1. That it appeared, that Mr. *Naiß* had carried out great quantities of silver, and had sent home great quantities of gold.

2. That he had broken his trust, violated his covenants with the company, &c.

3. That an information should be filed against him, and a Bill in Chancery, &c.

4. That the Chairman, Sir *Matthew Decker*, should be requested to take such measures as he should think fit,
to

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to secure his unlicensed goods, and bring his person to justice.

After these resolutions taken, it was discoursed about the *East-India* house, that a ship was to be sent to the *Cape*, or *St. Helena*, to seize the effects of *Naisb* on board the company's ships, and to bring him prisoner to *England*, to answer for his mismanagement in the company's service.

Ingram Lloyd says to *Int.* 4. That it was agreed in the Court of Directors to do so. *Hall* to *Int.* 4. That the Court threatened, and were come to a resolution to send a ship to seize his unlicensed goods, and arrest him and bring him by force to *England*, &c.

Woodford, who was Solicitor to the company, speaks to *Hall* as a friend of *Naisb*, asks what his wife intended to do to prevent a ship's being sent, to seize her husband; if she took no care in the affair, it would be sent; *Hall* said, that if he would have him, he would speak to her; *Woodford* replied, not from me, but as a friend of her husband you may tell her. *Hall* tells Governor *Harrison*, who was a friend of *Naisb*, this discourse; he bids him tell the wife; she in concern and terror on this news for her husband's life, who was a man of spirit, said, that she would do any thing to prevent it, and talked with Sir *Matthew Decker* the Chairman; who said, that the only way to prevent it was to deposit a sum of money; and on several meetings, and proposals of 10. 12. 15,000*l.* said that nothing less than 20,000*l.* would do; *Woodford* consulted how it must be done, and said that she must write a letter to the company, and offer the deposit; a letter was drawn by Governor *Harrison*, altered by Mr. *Barnard* her solicitor, approved by Sir *Matthew Decker*, and by his advice shewn to *Woodford*, who made several alterations, but (as Sir *Matthew* said) it was as well before, but *Woodford* must be pleased. The letter thus settled, and offering a deposit of 20,000*l.* was sent on the 29th of *September*, 1731. the proposals were accepted by the company; and the 20,000*l.* were afterwards paid in to them at three payments, namely, on the 5th of *October*, on the 19th of *October*, and on the

17th of *November*, 1731. but, as *Hall* believes, with reluctance, and from her apprehensions of the threats and resolutions of the company to send such ship, &c. and then the Court of Directors resolved that Mr. *Naijb* should have free liberty to come to *England* as proposed.

On the 19th of *May*, 1732. An information was filed against *Naijb* for the gold by him sent over.

In 1732. *Arbutnot* died.

In *July*, 1732. Mr. *Naijb* returned to *England*, declared that he was well pleased with what his wife had done.

On the 7th of *September*, 1733. Mr. *Naijb* by letter to the *East-India* company demands the 20,000*l.* by his wife deposited, as made by her without authority.

On the trial of the information for the gold, a verdict was against *Naijb* for 26,864*l.* but the case was found specially, which is not yet determined, nor brought on to be argued.

On this case the Chief Baron was of opinion, that the defendants, the *East-India* company, ought to account for the 20,000*l.* and interest.

He thought that many things insisted on ought to be laid aside in the consideration of the case.

As 1. The misbehaviour of Mr. *Naijb* in *China*, his breaches of his covenants, &c.

2. His approbation of what his wife had done in depositing the money.

3. Nor need it be inquired, whether Sir *Matthew Decker* had any authority from the company to act in what he did.

4. He said it was to be admitted, that the deposit was made on the terms proposed by the letters of Mrs. *Naijb*.

5. As

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5. As also that she had authority sufficient to do what she did.

But the Chief Baron insisted on it, that this deposit was drawn from her artfully, and insidiously, and by false representations; and that the only consideration to be made in this case, was whether she was fairly induced to make it or not.

That where a person threatens such usage to another as he cannot legally carry into execution, but by violence may act against him, and thereby prevails on him to do what otherwise he was not bound to do, the act so done ought to be set aside in a Court of Equity.

That in this case it appears, what Mrs. *Naisb* did was through the terror and threats used to send a ship to the *Cape*, or *St. Helena* to seize her husband's effects, and to seize his person, and to bring him a prisoner to *England* by force: this is what they could not do by law, but this is what they threatened to do, and the terror of it was artfully insinuated to her, that it would be done.

It was agreed, as *Ingram Lloyd* says, to be done in the Court of Directors; it was generally whispered and discoursed that it would be so about the *East-India* house. Mr. *Woodford*, who was solicitor to the company, desired *Hall* to tell her it would be so, if she did not take care to prevent it; and when he bids him tell her, but not from him, it looks like an artful contrivance to make the deeper impression upon her to draw her to a compliance.

Then Governor *Harrison* who was a director, Sir *Matthew Decker* who was chairman of the committee, all contribute their endeavours to the same end, and persuade her to do so. Sir *Matthew Decker* saith, that resolutions were taken to do it, nothing could prevent it but a deposit of a sum of money; Governor *Harrison*, Sir *Matthew Decker* and *Woodford* join to persuade her to make an offer of such deposit by letter; frame a letter for that purpose; it must be 20,000*l.*; *Woodford* varies

varies the letter, that it may be express and positive, and not appear as if she was frightened into it; and by these means she was induced to do what otherwise she was no ways obliged to do; she was prevailed on to do it by the arts and contrivances of agents of the company, and they had the benefit of what their agents did; the money was by these means drawn into the company's stock, who ought consequently to repay the money with interest.

Baron *Carter* concurred in opinion.

I differed in opinion, apprehending that it was not fit in conscience, considering the circumstances of the case, to decree the company to repay the 20,000*l.* deposited by Mrs. *Najb*, unless Mr. *Najb* had made the company safe against his imbezilments in their service, or had shewn that there was no probable ground to apprehend that he had committed any.

It appears that information was given by Mr. *Arbuthnot* to the company that Mr. *Najb* had misbehaved in their service; that he had set down higher prices for tea, coffee, &c. bought for them, that what he really gave, which was a direct breach of his covenants; that Mr. *Arbuthnot* gave in the diary and journal which he had kept of his proceedings, and could swear that all he informed them of was true, although he could produce no other proof of the matter.

Upon this information which was on the 14th of *July*, 1731. the company took time to consider what was fit for them to do, and in the mean time discovered that *Najb* had put on board Captain *Dent*, and sent home three hundred and sixty-four flat pieces of gold or shoes, as they call them, worth near 50,000*l.* though by the absence of the witness, who had taken the exact weight, the jury on the trial found but 26,800 and odd pounds; this appeared evidently true by Mr. *Najb*'s own letters to Captain *Dent*, dated the 10th and the 11th of *December*, 1730. and by Mrs. *Najb*'s re-

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ceipt for them, dated the 6th of *July*, 1731. all now in proof before the Court.

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Upon this discovery, what has the company done? On the 13th of *August*, 1731. in a Court of Directors it was resolved, That Mr. *Najb* had been guilty of a breach of trust and breach of covenants; that an information should be filed against him for the gold, and a bill of equity to bring him to an account for his other imbezilments; and Sir *Matthew Decker* their chairman was desired to take such measures as he should think fit, to secure his unlicensed goods, and bring his person to justice.

What is there in these resolutions that was improper or unreasonable for the company to do, or what is there in any degree illegal? here is strong proof or presumption at least, that the plaintiff was guilty of gross abuses in the company's service; if true, what more fit than to secure his unlicensed effects, and to bring him to answer for his faults in a court of justice? if they could, no body can say it was improper, or that it was unlawful for them to do it.

It may be proper to consider what power or authority the company has in such a case; by their charter read in evidence, 10 *W. 3.* the company hath power to seize in *England*, in the *East-Indies* or elsewhere, all ships, goods, bul-
 lion, &c. forfeited by the statute (a) 9 *W. 3.* or seizable for want of an entry, or a false entry in the books of the company, or for non-payment of the duty of 3 *per cent.* or for unlawful trading, or any other offence against the said act, whereupon that might be forfeited, or seized by virtue of the said act.

(a) Stat. 9 & 10
Will. 3. c. 44.
sec. 68.

By the statute 3 *Geo. 2. c. 14.* all powers granted by any of their charters are confirmed.

So that the company have undoubtedly a power to seize or secure any unlicensed goods carried to or brought from the *East-Indies*, and every subject or body politick of the
 realm

realm hath power to bring the person that injures him to justice; and when the company authorised Sir *Matthew Decker* the chairman to do so by such measures as he should think fit, that means, and is always understood, by all lawful means. Wherever any thing is referred to the wisdom, judgment or discretion of another, it is always to be intended and interpreted according to law and justice. 10 Co. 140. a.

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2 Bull. 198.
Hardr. 146.
Co. Lit. 227. b.
Cro. Jac. 336.

So that nothing appears in this case to have been done by the defendants, but what was lawful, reasonable and proper for them to do.

But it has been insisted, that upon the foundation of these resolutions, the agents of the company, Mr. *Woodford* their solicitor, Sir *Matthew Decker* their chairman, and Governor *Harrison* have artfully spread abroad terrifying reports of sending a ship to seize the goods and person of Mr. *Najb*, and bring him by force to *England*; and by insinuating cunningly these menaces and designs to Mrs. *Najb* induced her to make a deposit, which she was not obliged to do, and unless she had been artfully wrought upon by such contrivances would not have done.

But first, if the agents of the company had done any thing unlawful, which the company did not authorise them to do, they ought to be answerable for it, and not the company; nothing is a more certain and known rule in law, than that if I command a lawful thing, and my servant do it in an unlawful manner, he must be answerable for the trespass or misdemeanour, and not the master; (1) this Mr. *Najb* was sensible of, for he at first brought his bill against Sir *Matthew Decker* as well as the company, though before an hearing he thought fit to dismiss it as to him.

Where a servant executes a lawful command of his master in an unlawful manner, he is answerable for the misdemeanour and not the master.

And although Sir *Matthew Decker* and the others were Members of the company, yet it is well known, that the law

(1) *Quere*, Would not the master punishable by a criminal prosecution. be liable to an action for damages, Supra p. 107. at the same time that the servant is

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doth not charge any corporate body with any act done by them, who are members of it, but they are answerable for all such acts personally, and in their natural capacity, unless they act by express authority from the corporation, which cannot be given but by some authentick deed or writing of theirs. Now there is no pretence that there was any other resolution or act of the company, but what has been read : *Ingram Lloyd* indeed in his deposition expresses himself, that it was agreed in a Court of Directors, that a ship should be sent, &c. but what he means by its being agreed *non constat*, it might possibly be the sentiment of some of the Directors, that this might be done, and they might talk or agree to do it, but there is not the least proof or colour that this came to be the sentiment, much less the resolution of the Court of Directors, or that any such determination was ever made by them ; without which it can never be esteemed or imputed as the act of the company. Whatever some of the Directors might think as to their power in that respect, it is manifest that the determination was to refer it to such measures as Sir *Matthew Decker* should think fit to take, that is, as he should be advised would be proper for him to proceed in upon this occasion.

2. These who are called agents to the company, acted really as friends to Mrs. *Naisb*, and were consulted with and advised with by her as such ; what Mr. *Woodford* mentioned to *Hall* was mentioned by him as to a friend of Mr. *Naisb*, and although he desired Mr. *Hall* to speak to Mrs. *Naisb* as of himself, and not from him (which is urged as a piece of art and cunning in Mr. *Woodford* to communicate what he said would be done in an underhand way, in order to make the greater impresson upon her,) yet there is no proof that he had any orders from the company or any of its members to do so ; and in reality he not only appeared to be a friend in it to Mrs. *Naisb*, but did, as far as I can see, a real piece of friendship to the plaintiff ; it was what the chief friends of Mrs. *Naisb* thought well of, and advised her to, for Mr. *Hall* did not immediately tell her what

what *Woodford* said, till he had first advised with Governor *Harrison*, who though he was a director, yet was consulted as a particular friend of the plaintiff, and really acted with friendship for him, as did likewise Sir *Matthew Decker* who was consulted as a friend, and although they severally persuaded her to deposit 20,000*l.* as a security for her husband's coming to *England*, and abiding what the company should charge him with, yet this was what seems to me very kind and friendly advice.

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3. For what is it they advised her to do? Mr. *Najib* was evidently guilty of several breaches of his articles with the company; they had resolved to prosecute him for those breaches; to take the best methods their chairman Sir *Matthew Decker* upon consultation should think fit to pursue, to secure his unlicensed effects, and bring him to justice.

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It cannot be denied but that they might have sent a ship to the *Cape* or *St. Helena* to seize his unlicensed goods on board the company's ships; this is warranted by the power of their charter, confirmed by the statute 3 *Geo. 2. c. 14.*

By the statute 9 & 10 *W. 3. c. 44. sec. 64.* No member of the *East-India* company shall trade, but in the joint stock of the corporation, of which he is member; and no person who shall have the management, &c. of the voyages or affairs of the company, shall be allowed to ship or send from the *East-Indies* any goods, &c. till sworn to be faithful to the company, &c.

And by the stat. 7 *Geo. 2. c. 21. sec. 4.* all goods shipped for the *East-Indies* (not licensed) or taken out of any ship in her voyage homeward from the *East-Indies* to *England*, shall be forfeited with double the value, &c.

By the statute 9 *Geo. c. 26. sec. 8.* a *Capias* may issue as the first process upon any information filed for any offence mentioned in any act for securing trade to and from the *East-Indies*, &c. upon which the offender shall be obliged to give bail to answer such prosecution, and pay all the penalties

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and forfeitures incurred by such offence, if convicted, or yield his body to prison.

So that not only Mr. *Naisb's* unlicensed goods might have been seized; but on filing such an information as was ordered by the Court of Directors, a *Capias* might have been taken out against his person, upon which he might have been seized or arrested as soon as he came *infra corpus comitatus*, and detained in custody till he found bail to answer the forfeitures or penalties incurred.

[472] What then do her friends advise her to do to prevent this proceeding? Why to make a deposit of 20,000*l.* to abide what the company should by law or arbitration recover from him; is any thing unjust or unreasonable in this? No, it was what Mr. *Naisb*, if present, ought in justice, in honour, in conscience to have done; and what if he had refused to do, he might have been compelled by law to do; which would have made the company equally secure, though with more harsh usage, more dishonour and disgrace to himself.

But it is urged, that they insinuated and inculcated to Mrs. *Naisb*, that they would send a ship to the *Cape* or *St. Helena* to seize his person as well as his unlicensed goods, and bring him a prisoner to *England* by force, which was more than they could lawfully do, whereby she was put in fright and concern for the life of her husband, and thereby induced with reluctance to make the deposit, which otherwise she would not have done; the deposit being therefore drawn from her artfully and unfairly by false representations, ought to be looked upon as null and void in itself.

But to me there seems a considerable difference, where the thing prevailed upon to be done is a thing just and reasonable in itself, and where it is an act in itself unreasonable and tortious to him that does it. In the first case many instances might be given, where the thing shall stand good, notwithstanding some irregularity in the obtaining of it; *quod fieri non debuit, factum valet.*

But

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But to make what has been done in this case to amount to a fraud and imposition upon Mrs. *Najb*, is to presume what does not appear in proof, and yet it is a known rule, that fraud is never to be presumed; the circumstances, that must help out the Court to determine the proceedings of the defendants the *East-India* company in this case to be a fraud upon the plaintiff, must be all extended by presumption, for there is no positive proof of them with regard to the defendants. It is said, that the *East-India* company came to a resolution of sending a ship to bring the plaintiff a prisoner to *England* by force, in order to influence Mrs. *Najb* to make a deposit; but no such resolution appears, it is only presumed, because there was such discourse about the *East-India* house; and *Lloyd* says, it was agreed in the Court of Directors, but by whom or when it does not appear; it is certain that no such determination appears upon the company's books, or other authentick act of the company.

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It is said, that *Woodford*, Governor *Harrison*, and Sir *Matthew Decker*, treated as agents of the company, but no authority given to them by the company appears; it may as well be presumed that they acted as friends to the plaintiff.

It is presumed, that these agents raised the rumours of sending a ship for the plaintiff by concert and contrivance with the defendants, to terrify and intimidate Mrs. *Najb*; but it may as well be presumed, that the talk arose from mistake and misapprehensions of the law in this matter: by the statute 9 Geo. c. 26. sec. 7. made to prevent his majesty's subjects from trading to the *East-Indies* under foreign commissions, it is said, that all offenders may be seized and brought to *England*, and committed to gaol till they have found security to answer the offence, and not go out of the Court or the Kingdom without leave of the Court.

And by the statute 5 Geo. c. 21. it is provided, that if any of his majesty's subjects shall go to or be in the *East-Indies*,

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contrary to the laws now in being, it may be lawful for the company to arrest and seize such person where found in the limits aforesaid, and to send him to *England* to answer the offence, &c. This act cannot extend to the plaintiff, who went by license, and as servant to the company; but it is possible, nay not improbable, it might be at first apprehended to do so, till upon maturer consideration or better advice they became convinced of the contrary; so that all the discourse and talk of sending a ship, &c. was not the effect of any fraudulent contrivance to impose upon the plaintiff, but mere ignorance or inadvertency; and then the case will be exactly parallel to that of *Frank* and *Frank*, 17th May, 19 Car. 2. where a man seised of a copyhold in fee, and of a freehold in tail, with remainder to his elder brother, devises the freehold to his younger, the copyhold to his elder brother; the brothers came to an agreement in writing, that each should enjoy the lands according as they were devised by the will; and to draw on such agreement the younger brother pretended that the testator had suffered a recovery; but there was really no recovery on record, but only a commencement of a recovery, which might have been perfected, if the party had lived; the elder brother being intitled to the freehold, there being no recovery, and to the copyhold as heir, there being no surrender to the use of his will, it was insisted in Chancery that this agreement was founded on a fraud, there being a pretence of a recovery when there was none. But by the decree at the rolls, and afterwards by the Chancellor on an appeal, the agreement stood. (a) 1 *Ca. Chan.* 84.

(a) 1 Eq. Abr.
24. pl. 4.

And as there appears no fraud in the present case, so there appears no imposition upon Mrs. *Najib*; in what she did she was apprised of the law, as well as the defendants, and of the resolutions of the Court of Directors; had time to advise on what she did, and did long advise and deliberate about it; it was plainly proposed what was desired, and she formed her letter not only on a consultation with Governor *Harrison* her friend, but with *Hall* and Mr. *Bernard* her own solicitor,

solicitor, so there cannot be the least colour of surprise or imposition upon her.

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4. But what she did was not only approved by her friends, but by her husband himself after his return to *England*, who declared himself well pleased and satisfied with what his wife had done. Now indeed when he has been permitted to return home, and continue here undisturbed till he has disposed of and settled all his affairs, and all his illicit effects, when there is a verdict standing out against him for 26,800*l.* he would willingly get the 20,000*l.* deposit out of the defendants' hands, as well as the gold, of which, by the absence of a witness, they could not prove the value.

If indeed the plaintiff had given security to abide the event of the prosecutions against him, if there had appeared no ground for any such prosecution, or in case the prosecutors had grossly delayed their proceeding, there might be some pretence for the desire of having the deposit restored. The first pretence for the plaintiff's bringing this bill was, that his wife had no authority from him to make it; it was upon that foot he made his demand of it from the Company; but his letter of attorney to his wife being now discovered, whereby it appears she had full power from him to act as she did, he now puts it upon the foot of fraud and imposition; but as there does not appear any thing done by the defendants, but what they might lawfully do; nor any thing done by *Woodford*, *Sir Matthew Decker*, and Governor *Harrison*, but in friendship and service to Mrs. *Naisb*; nor any thing done by her but what was just and reasonable in itself, and advantageous to her husband, and approved of by him, and what he was bound in honour and conscience to have done, or to give security to the Company to answer their demands against him; I cannot think it agreeable to equity and conscience to take this money out of the hands of the defendants, and pay it to the plaintiff, who approved the deposit, and has already enjoyed the advantage on his part of the terms upon which the deposit was made; unless he give security to abide the event

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of the defendants' prosecution against him, or it appear that there is not any reasonable ground for such prosecution.

In case there be any real fraud or imposition upon Mrs. *Najb*, that would avoid what she did at law as well as in equity; the plaintiff may bring his action against the defendants for so much money received by them to his use; in case the money was extorted from her by illegal means, by menaces, threats or impositions, without any reasonable consideration. But if the plaintiff cannot recover at law, I do not see any just cause why equity should interpose to annul an act just and agreeable to conscience, unless the plaintiff would do what conscience and equity require; which is to make the defendants safe in respect to any frauds committed by him in their service. He that expects equity should do equity.

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What is said, that it is hard that the plaintiff should be kept out of so large a sum of money, proceeds from not considering that Mrs. *Najb* had received the 364 shoes, or flat pieces of gold, near three or four months before her deposit, so that she was enabled out of this illicit treasure to raise the whole money before it was paid; and that there is now found a verdict against the plaintiff for more than that sum which was deposited, which, if judgment be against the plaintiff upon that verdict, the defendants might seek for as they could, when the plaintiff has given no security to answer their prosecution; that if in the event of these proceedings, it shall appear that there is nothing due from the plaintiff to the defendants, the plaintiff will be reimbursed the money deposited with interest.

Baron *Thompson* thought that the defendants ought to be charged with all the acts of *Woodford*, Sir *Matthew Decker*, and Governor *Harrison*, since they acted for them and their benefit, and must be supposed to do so by authority, since Sir *Matthew Decker* acted by their order, and declared that the Company had come to resolutions to send a ship to seize the plaintiff; and *Lloyd* said that it was so agreed in the Court of

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Directors. But he gave his opinion against the defendants returning the deposit to the plaintiff at present.

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The Court being divided in opinion upon this case, the decree was suspended till Sir *Robert Walpole*, the Chancellor of the Exchequer, could be at leisure to hear it, and give his opinion therein; which he did in *Michaelmas* Term following; when the case was again argued by the counsel on both sides before him and the Barons, and after hearing the arguments of the counsel, the Barons delivered their opinions *seriatim* as before; after which the Chancellor gave his opinion as follows:

He was of opinion, that the money was not proper to be repaid by the Company; that he should think the Company ought to be bound by the act of the agents of the Company; but in this case he apprehended, that the transaction between the Company and Mrs. *Naisb* began on the 29th of *September* 1731; that then she by letter made a proposal of a deposit of 20,000 *l.* to secure her husband's return to *England*, and abide the determination of all disputes at law, or by arbitration; provided they would give assurance that he should not be arrested, nor his person secured. This proposal was accepted, and the assurance given; all that preceded was a treaty to bring on this accommodation; the friends of Mrs. *Naisb* did the best they could for her; Mr. *Hall*, Mr. *Bernard*, and Governor *Harrison*, formed a letter for her to write to the Company; Mr. *Woodford* and Sir *Matthew Decker* acted on behalf of the Company, did the best they could for them, altered the letters as might best suit them; Mr. *Woodford* and Mr. *Bernard*, for aught I hear were of equal abilities, and each was willing to assist his own client.

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That the letter of Mrs. *Naisb* was for two purposes, to secure her husband's return to *England*, and his abiding the issue of all suits there, when returned. It is evident the last is not yet fulfilled, informations were ordered, and good ground for them; whether all the evidence appeared then which is now produced, appears not; but whether it did or not, the Company

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pany had then information of frauds committed by the plaintiff, which are now verified and made plain by letters under his own hand. It was their duty upon such a discovery to order a prosecution; they could not otherwise answer it to the world, nor discharge their trust to the Company; this therefore is done, an information was filed, is now depending; he hath given no other security to answer the Company's demands; and as this deposit of 20,000*l.* is the only security they have, and Mrs. *Naisb* had power to make it, I think it not reasonable to take this security from them.

Chief Baron and Baron *Carter*. Then the plaintiff's bill ought to be dismissed; which being objected to by the counsel for the plaintiff, the other Barons were for retaining it till the end of the suit depending. To which I said, that the opinion of the Chief Baron and Baron *Carter* being, that the 20,000*l.* should be repaid by the Company with interest; I and Baron *Thomson* were against the repayment, at least till the event of the information now depending appeared, upon which possibly more than that sum might be recovered from the plaintiff. But since it was then objected, that the detainer could not be decreed on that bill, and the plaintiff might by a new bill (having made the Company safe) be relieved, I am not against the dismissal.

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Cafe 210. *The King vers. Frances and Others.* Before all the Judges at Serjeants Inn.

On a special verdict in an indictment for a robbery on the highway, the words *then and there immediately* do not sufficiently ascertain the time to find the prisoners guilty. 2 Str. 1015. Cal. Temp. Hard. P. 113. S. C. Dougl. 211.

AT the assizes held at *Wells*, for the county of *Somerset*, on the 31st of *July*, 7 Geo. 2. before Chief Baron *Reynolds*, *John Frances* and five others were indicted for a robbery on the highway upon one *Samuel Cox*; and the Chief

2 Str. 1015. Cal. Temp. Hard. P. 113. S. C. Dougl. 211.

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Baron being doubtful upon the evidence, whether the offence amounted to robbery, directed it to be found specially.

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And it was found, that *Samuel Cox*, travelling on the highway toward *Somerton Fair*, saw the prisoners in the road standing in company together, save that one of them was lying in the road upon the ground. *Cox* passed by them, but one of the prisoners called to him, and desired him to change half a crown, that they might give something to a poor *Scotchman*, meaning the person that was lying upon the ground; that thereupon *Cox* came back, and putting his hand in his pocket, intending to pull out money to change the half crown, pulled out some pieces of gold, viz. four moidores, and a *Portugal* piece value 3*l.* 12*s.* that *Cox* having the pieces of gold in his hand, the defendant *John Frances* (he and all the other prisoners being in company together) gently struck his hand, whereby the pieces of gold fell on the ground; that *Cox* got off from his horse, and said that he would not lose his money so; that *Cox* offering to take up the pieces of gold, then lying on the ground in his presence, the prisoners swore, that if he touched them they would knock out his brains, whereby *Cox* was put in bodily fear of his life, and desisted from taking up the said pieces of gold.

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And the jury further find, that the said prisoners *then and there immediately* took up the said pieces of gold and rode off with them; that *Cox* immediately pursued and rode after them about half a mile, and then the prisoners struck him, and his horse, and swore that if he pursued them any farther that they would kill him; upon which *Cox* ceased to continue his pursuit any farther, *et si super totam materiam, &c.*

Upon this special verdict the Justices of the King's Bench were doubtful whether the verdict had found the fact so certainly that they could determine it to be a robbery, and therefore they desired the opinion of the other Judges, who met at *Serjeants Inn Hall*; and it was argued by counsel for the Crown, and for the prisoners; and upon consideration the Judges seemed generally to think, that the finding of the jury

was

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was not so plain and certain that the Court could pass sentence of death upon the prisoners.

A taking in the
presence is a
taking from the
person.
2 Hale P. C.
553.
Style 256.

It had been insisted on, that although the prisoners did not at first use force, but gently struck Cox's hand, upon which he dropped the gold, and so there was no putting him in fear; yet what was found afterwards seemed to find a fact that had all the essentials of that offence, which the law calls robbery, which is a forcible or violent taking of goods from the person of another, putting him in fear (1). 3 Inst. 68. 1 Hawk. P. C. 147. that taking goods from his presence was always holden to be a taking from his person, if by force and putting him in fear; and therefore if a man have his horse or coat by him, and a thief by force putting him in fear, take it away, it is robbery. 1 Hawk. P. C. 148. Or if he take cattle by force out of a field, the owner being present and put in fear. 1 Hawk. P. C. 148.

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Then laying the first part (gently struck his hand) out of the case, it was afterwards found that the money was lying on the ground in his presence; and then the prisoners swore that if he touched it they would knock his brains out, upon which being put in fear he desisted, and they took it; that when they gently struck the money out of his hand, he did not lose the property, but the property continued in Cox, and the money was his still, though lying on the ground, and then when the prisoners by threats which put him in fear forced him to desist from taking it up, and they immediately took it up, this is a taking from his person, being a taking of his goods

(1) Judge Foster in his Crown Law says, that the want of this circumstance alone, namely the being put in fear, ought not to be regarded. I am not clear, continues the Judge, that that circumstance is of necessity to be laid in the indictment, so as the fact be charged to be done *violenter et contra voluntatem*. I know there are opinions in the books which seem to make the

circumstance of fear necessary; but I have seen a good M. S. note of an opinion of Lord Holt to the contrary; and I am very clear, that the circumstance of actual fear at the time of the robbery needeth not to be strictly proved, &c. p. 128. 1 Hale, P. C. 534. 4 Bl. Com. 243. 1 Hawk. P. C. 149, in note.

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1 Hale P. C.
533.

by force in his presence, and putting him in fear. And though it is not found that they took it in his presence, yet if it be all one continued act, the force, the putting in fear, and the taking, it will be sufficient; for the cases *Stamf. P. C.* 27. *Grompt. Just.* 30. 3 *Inst.* 69. where it is said, if a thief assault a true man in the highway to take his purse, and he in flight to escape throw his purse into a bush, or his hat fall off, and the thief perceiving it, take up the purse or hat, it is robbery, were allowed to be good law; because, as Lord Coke says, it was at the same time; whence it was inferred, that here it being found, that when Cox by force and terror desisted from taking up his money, and the prisoners then and there immediately took it up, that was sufficient to denote the time of taking to be one and the same with that in which the money was forced from him by those threats which made him desist from taking it up.

But the Judges seemed unanimously to agree, that the case was to be considered upon the special verdict, and that was not to be made good by intendment or construction. It was not denied, but that if a thief set upon a man to rob him, and he throw away his money or his goods (being near him and in his presence) and was forced away by terror, and the thief took them, it would be robbery; and therefore here possibly it might have been well, if the jury had found, that when Cox desisted, the prisoners at the same time, or without any intermediate space of time, or instantly took it up; but the word *immediately* has great latitude, and is not of any determinate signification; it is in dictionaries explained by *cito*, *celeriter*; in writs returnable *immediatè* it has a larger construction, as soon as conveniently it can be done. In *Mawgridge's* (1) case (2) it is twice mentioned, but with words added to ascer-

(1) 1 Kel. 119.
9 St. Tr. p. 61.

(1) So in the special verdict in *Onley's* case, the word *immediately* is used four different times to different purposes. 2 Str. 766. 2 Lord Raym. 1485. 9 St. Tr. p. 17.

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(a) St. 27 Eliz.
c. 13. s. 11.
Vet. Intr. 218.
Co. Ent. 343.
Rast. Ent. 406.
Clift. Ent. 378.
Har. Pl. 214.

tain it, as *without intermission, in a little space of time, &c.* In the statute (a) 27 Eliz. it is directed, that (3) notice be given as soon as conveniently may be; in the pleadings that is usually expressed by *immediatè*; so that *then and there immediately* doth not necessarily ascertain the time, but leaves it doubtful; besides, it is proper to take notice, that in this verdict the words *then and there immediately* are not coupled in the same clause or sentence with the words preceding; but it is a distinct clause, and a separate finding.

The Court of King's Bench (pursuant to this opinion of the majority of the Judges) held, that the defendants ought to be discharged of this indictment. Then a question arising, whether the defendants ought to be discharged out of custody? It was held that they should not, but that they should be remanded; for though no robbery is found by the verdict, yet it appears that they are guilty of grand larceny, for which no judgment can be given upon this indictment; for this differs from burglary and other cases, where the prisoner may be acquitted of the burglary and found guilty of the felony; but here the offence is laid to be a robbery in taking *a persona*; and that being the only doubt of the jury, the Court cannot give judgment against them upon this indictment, but must discharge them as to it, and remand them in order to be tried upon a new indictment for the grand larceny.

(3) The words in the statute are, *robbed shall with as much convenient speed as may be give notice,* &c.

Attorney General *vers.* Perry. Intr. in Scacc. Case 211.
Pasch. 7 Geo. 2. Rot. 29.

THIS was an Information by the Attorney General for 623 *l.* 14 *s.* 3 *d.* halfpenny, due to his Majesty for so much money received by the defendant for his late Majesty's use, between *April* the 1st, 1725, and the 1st of *September* following.

Money received for the drawback of goods and merchandize, not fairly exported according to the Statute, is liable to the King's demand, though in the hands of a third person not *particeps criminis*.

The defendant pleads, that he is not indebted for the said sum.

Upon a trial by a jury of *Middlesex*, they find specially to the effect following, *viz.* That on the 24th of *September* 1724, the defendant imported into the port of *London* 28333 pounds weight of *Virginia* tobacco, and paid custom for the same, *viz.* 88 *l.* 10 *s.* 9 *d.* halfpenny for the old subsidy, and gave security by bond to pay 535 *l.* 3 *s.* 6 *d.* halfpenny for the additional duties due to his late Majesty on importation of the said tobacco. That in *May* 1725, the defendant sold the said tobacco to *Richard Corbet*, for exportation to *Cadiz* in *Spain*, and shipped off the same in the port of *London* in the ship called the *Francis and Mary*, *Isaac Cocart*, master, for *Cadiz*. That on the 14th of *July* 1725, *Richard Corbet* made oath before the proper officer, that he had the direction of the said voyage, and that all the said tobacco so shipped was exported really and truly for parts beyond the seas, on commission, and that none of the said tobacco had been since landed, or was intended to be relanded in *Great Britain* or *Ireland*.

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That *John Walkley*, the defendant's servant, made the usual oath, that the duty of the said tobacco was paid or secured, and that the defendant had sold it for exportation. That on the 5th of *June* 1725, a declaration of the contents of the loading of the said ship was made in these words. *A content*

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in the Francis and Mary, Isaac Cocart, for Cadiz, 40 ton, 5 men, 4 guns, 1, 38. Micha. Perry, &c. That on the same day *Isaac Cocart* made oath under the said content before the proper officer, that the said content contained a just and true account of all the goods, &c. on board his ship for the present voyage, and that he would take no more goods on board without first paying custom, and having a warrant from the King's officers; and that if he should take on board any certificate goods, or goods that received a drawback, bounty, or premium on exportation, that he would not reland them, or suffer them to be unshipped in order to be relanded, without the presence of the King's officers.

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That the said tobacco being so put on board the ship, and certified by the proper officers of the customs, two debentures were made out; one for the drawback of 88*l.* 10*s.* 9*d.* halfpenny; the other for the drawback or discharge of the 535*l.* 3*s.* 6*d.* halfpenny, secured by the defendant, upon which the defendant, on the 13th of *August* 1725, received back the 88*l.* 10*s.* 9*d.* halfpenny; and on the 17th of *August* 1725 had his bond for the 535*l.* 3*s.* 6*d.* halfpenny delivered up to him.

That this tobacco after it was put on board was landed in *Ireland* on the 28th of *July* 1725, but without the defendant's privity, nor had he the property in it from the time it was put on board, nor the direction of the voyage; but it was sold by the defendant for 1269*l.* 11*s.* 2*d.* for exportation to the said *Richard Corbet*; whereof 645*l.* 16*s.* 10*d.* halfpenny was paid in money, and the debentures were taken for the remainder of the price, and if by any accident the debentures became void, the said *Richard Corbet* was to answer the amount in money to the defendant.

That *Richard Corbet* hath been absent five years, but the King's officers had no notice of the tobacco being landed in *Ireland* till *June* 1733. *Et si supra totum, &c.*

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It was argued by the Solicitor General, that the money which the defendant received by the debentures for the drawback, was money originally due to the King; and that nothing had been done which should divest the King's right to it, and consequently that the defendant having received the King's money, must be indebted to him.

By the statute 12 Car. 2. c. 4. and the statute which gives the additional duties, the monies given are due to the King; and though by the book of rates a drawback is allowed on exportation, that must be a real exportation; for by the statute 13 & 14 Car. 2. c. 11. s. 12. Par. 3. if goods shipped out by certificate be relanded, &c. no allowance shall be demanded or made for those goods. And by the statute 4 & 5 W. & M. c. 15. s. 13. no person shall be allowed to swear to a debenture for any duties to be drawn back upon re-exportation, but he who is the true exporter, as being interested in the property and hazard of the goods; or as being employed by commission, is concerned in the direction of the voyage, so as to be able to judge that the goods are really and *bonâ fide* exported, and not landed or intended to be relanded, &c. And the debenture for the duties on tobacco by the stat. 7 & 8 W. 3. c. 10. s. 5. is to be on parchment, and the duty printed on it in *hec verba*, and signed and sworn by the exporter. By the stat. 8 Anne, c. 13. s. 16. reciting, that by law every person importing tobacco or other foreign goods is entitled to a drawback of the duties paid or secured, &c. If tobacco, &c. for which a drawback or debenture for it is to be made, be relanded, the exporter forfeits double the value of the drawback, &c. By the stat. 6 Geo. c. 21. s. 49. if any tobacco exported be landed in *Ireland*, the same and double the drawback of it shall be forfeited, and every debenture for the drawback shall become void, as if the tobacco were relanded in *Great Britain*.

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Since therefore the defendant received from the King's officers the sum of 88*l.* 10*s.* 9*d.* halfpenny, and his bond for 535*l.* 13*s.* 6*d.* halfpenny, under colour of two debentures, which were in themselves void by reason of the landing

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of the tobacco in *Ireland*, before the receipt of the money (for the verdict finds that the tobacco was landed in *Ireland* on the 28th of *July* 1725. and the 88*l.* 10*s.* 9*d.* halfpenny received back on the 13th of *August*, and the bond delivered up on the 17th of *August* following) this is money received from the King's officers without any proper authority, and consequently is money received to the King's use, and the defendant is chargeable for it on that account.

It was insisted on the other side by Mr. *Strange*; and afterwards argued by Mr. Attorney General for the Crown, and Mr. *Bootle* for the defendant, in *Michaelmas* Term ensuing; and by Mr. *Bootle* it was also insisted, first, That this was a case of great hardship on the defendant, who was an innocent person, guilty of no fraud; for the Jury find that he had sold his goods for exportation, and all was done which the law requires should be done to secure against the tobacco being relanded; they were entered with the custom-house officers for *Cadiz* in *Spain*; they were shipped for *Cadiz*; the declaration of the contents of the loading was for *Cadiz*; *Corbet* made oath that he had the direction of the voyage, that the tobacco was really and *bonâ fide* exported for parts beyond the sea, and the defendant's servant made oath that they were sold for exportation; and the Jury expressly find that the landing in *Ireland* was without the defendant's privity; and if after all this the defendant shall be answerable for the default of the buyer, no merchant can be safe.

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Supra p. 434.
Infra p. 454.

That the case was harder still in the information against the defendant and others as executors, for as *nullum tempus occurrit regi*, the executor may be charged after all assets disposed, and yet the King ought to be preferred.

2. It was argued that the exporter is the person only liable, and *Corbet* was the exporter. By the stat. 4 & 5 *W. & M. c.* 15. *sect.* 13. it appears who is the exporter, namely, he who is interested in the property and hazard of the goods; or he who being employed to act by commission is concerned

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in the direction of the voyage, and no other is to take the oath which intitles to the drawback; now the Jury find that *Corbet* had the property of the goods, and not the defendant; that *Corbet* took the oath, and as he only entitled himself to the drawback, he only is answerable for it. If the goods be afterwards relanded, he forfeits the double value, by the stat. 8 Ann. c. 13. sec. 16. and by the stat. 6 Geo. c. 21. sec. 49. But as the defendant is found not to have the property of the goods, not to be concerned in the voyage, and consequently could not run any hazard in it, as he did not take the oath, and was not intitled to the drawback, he ought not to suffer by any default of *Corbet* who was the owner.

3. That the defendant in this case did not receive the money to the use of the King, but to the use of *Corbet*, and as servant or agent to him; the verdict finds it was received for the satisfaction of *Corbet's* debt, and then it must be to his use; suppose *Corbet* had received the money himself, and paid it to the defendant, and afterwards relanded the tobacco, should the defendant have been charged? Why then, when he takes the debenture and receives it to pay himself? In the case of *Tomkins* (1) and *Barrett*. 1 Salk. 22. (a) where

(a) Skin. 411.
S. C.
Infra p. 493.

(1) Lord *Manfield* in the case of *Smith v. Bromley* reported in *Douglas*, expresses himself in the following manner, "As to the case of *Tomkins v. Barrett*, it has been often mentioned, and I have often had occasion to look into it; but it is so loosely reported, and stuffed with such strange arguments, that it is difficult to make any thing of it. One book says, it was determined by Lord *Holt*; another by Lord *Treby*. Certain it is, it was only a *Nisi Prius* case. I think the judgment may have been right, but the reporter, (*Salkeld*) not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid, in part of principal and legal interest, upon an usurious contract; and, therefore, the action would not

lie, for so far as principal and legal interest went, the debtor was obliged, in natural justice, to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and, therefore, the man, who, from mere necessity, pays more than the other can in justice demand, and who is called, in some books, the slave of the lender, shall be said to pay it willingly, and have no right to recover it back, and the lender shall retain; though it is in order to prevent this oppression, and advantage taken of the necessity of others, that the law has made it penal for him to take." P. 697.

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Forr. 38.
2 Str. 916.

(a) 1 Str. 480.

Cowp. 566.
806.

Where money is
paid to a servant,
and he misap-
plies it, the party
has his remedy
against the
master or ser-
vant at his
election.

three were bound in a bond upon an usurious contract, and one paid part of the money, and afterwards the obligee sued another obligor who pleaded the statute of usury, whereby the plaintiff was barred and the bond avoided; then the obligor who had paid part of the money on this bond brought *Assumpsit* for it, as for money received to his use, but it was held by Chief Justice *Treby* that it did not lie. In the case of (a) *Cary and Webster, Mich. 8 Geo. Cary, Anno 1720* paid 500l. to *Webster* then a clerk to the *South-Sea* company, which was paid over to the company in reality, though omitted to be entered as paid; it was held by Chief Justice *Pratt* at *Nisi Prius*, that the money being received by the defendant as servant to the company and paid over, the company only was chargeable for the receipt of the money, and not the defendant; but if he had not paid it over, then indeed the plaintiff might have sued him, or the company, at his election.

To which Mr. *Bootle* added, that all actions of this nature must arise *ex contractu* or *ex quasi contractu*; and in both cases privity was necessary; but here is no privity between the King and the defendant; the dealing was with *Corbet*, he was intitled to the drawback and had the debenture for it, and consequently must be responsible for it to the King; the King cannot follow his debtor to the second or third degree; as this would be inconvenient, such measures should be taken as may avoid it, as may encourage commerce, which will be impracticable if the vendor shall be answerable for the default of the buyer,

Mr. Solicitor General in reply, and Mr. Attorney General more largely in his argument to Mr. *Bootle*, insisted, that they did not charge the defendant in this case with any fraud in relanding the tobacco, or obtaining the debentures, or repayment of the money or bond; since by this information the defendant is not charged for any forfeiture, nor yet for any fraud, or for any duties due from him to the Crown, but merely for the King's money by him received, in the same manner as any other person might be charged who should receive the money of the King or any subject;

and

and therefore he would admit, what had been so much insisted on, that the defendant was an innocent person, that he was not the exporter; that he received the money towards the satisfaction of his debt from *Corbet*, and that it was an hard case, that *Corbet* should defeat the debenture given him in payment.

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But it must be admitted, for it is expressly found, that the defendant received the money from the officers of the Crown, and that he received it by colour of those debentures on the 13th & 17th of *August*, whereas the tobacco, for the drawback of which these debentures were given, was landed in *Ireland* on the 28th day of *July* before.

Now the drawback to be allowed by the book of rates, which is confirmed by the statute 12 *Car.* 2. is upon exportation, if exported by a foreign merchant in twelve months; by an home merchant in eighteen months; and by subsequent acts the time has been extended to three years; so then if the goods be not exported, no drawback is to be paid; and if any debenture be given for it, it is null and void. But this appears more expressly by the statute 13 & 14 *Car.* 2. c. 11. sec. 12. where it is said, that if goods shipped out on which the drawback was allowable to be relanded, no allowance shall be demanded or made; surely the debenture must be void, if nothing can be demanded or paid upon it. So by the statute 6 *Geo.* c. 21. sec. 49. which more directly relates to the present case, it is said, if tobacco, to be exported, be landed in *Ireland*, the debenture for the drawback shall be void.

It was said by one of the defendant's counsel, that the act did not make it absolutely void, but saith, it shall become void as if relanded in *Great Britain*. But can it be imagined that these words import that it shall not be void; that the penalty for landing in *Ireland* should make the debenture for the drawback good, for so it must be if it is not become void? This would be a strange construction, but surely no words can more plainly denote, that the debenture for the drawback before was void, if the goods shipped for exportation

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tion were relanded in *Great Britain*, and so it shall be for the future, if they be landed in *Ireland*.

Now this being the case, that the debenture was void by the landing in *Ireland*, the defendant could not be intitled to receive any money upon it; and he that receives the money of the Crown, without any title to it, ought to pay it back again. Nothing can be a plainer and more evident position than this, that if a person demands money from an officer of the Crown, who pays it, upon supposition that it was due, but it afterwards appears not to be due to him, it is money received to the use of the King, and ought to be restored.

And this is not a demand which the King makes by virtue of any particular prerogative peculiar to the Crown, but the case would be the same in regard to any common person; so that this information is not otherwise to be considered than as an action on the case by a subject; who, in case any one shall demand or receive money from him without any title or authority for doing so, shall recover it back in such an action as money received to his use. The case cited (a) 1 *Sal.* 22. may be good law, (although it was only by a judge at *Nisi Prius*, where matters may not be maturely considered) because when a person is party to an usurious contract, and hath actually executed the contract he made, it may not be reasonable to allow him to unravel his own act, after he hath freely carried it into a compleat execution. (2) But in the same case it is agreed, that where a

Where money is paid under a void authority, an action will lie to recover it.

1 *Ld. Raym.*
742.
Bull. Nl. Pri.
133.
Intra p. 497.
(a) *Supra p.*
486.

(2) Lord Mansfield in the case of *Browning v. Morris*, reported by *Cowper*, declares that, "The rule is, *in pari delicto, potior est conditio defendantis*; and there are several other maxims of the same kind. Where the contract is executed, and the money paid *in pari delicto*, this rule certainly holds; and the party who has paid it, cannot recover it back. For instance, in *brilery*, if a man pays a sum of money by way of bribe, he

can never recover it in an action; because both plaintiff and defendant are equally criminal. p. 792. The case of *Wilkinson v. Kitchen*, reported in 1 *Ld. Raymond*, p. 89. seems however to oppose this doctrine as laid down by Lord Mansfield. *Buller* in his *Law of Nisi Prius*, says, "In such cases *melior est conditio defendantis*, not because the defendant is more favoured, but because the plaintiff must draw his justice from pure fountains." P. 132.

man

man pays money on a mistaken account, or under or by a mere deceit, he may recover his money back again. So a case is there cited, that where one bound in a policy of assurance paid his money, believing the ship was lost, when it was not, it was held, an action of *assumpsit* lay to recover it back. The case of *Jacob and Allen*, 1 Salk. 27. is much stronger; there *H.* having letters of administration to one, who was supposed to die intestate, makes a letter of attorney to the defendant to get in debts due to the intestate, who collects several sums, and pays them to the administrator; afterwards a will was discovered, the administration recalled, and an action of *assumpsit* brought by the executor against the defendant for monies received to his use; and held the action lay, for the administration was void, and so the defendant acted without authority; and then there was nothing to hinder the raising an implied contract, and the charging the defendant in an *Indebitatus Assumpsit*; although it was urged, that the money being received by a special authority, and for a particular purpose, and afterwards paid over to the administrator, the action ought to have been brought against the administrator, and not against the defendant, who acted as his servant, and had paid the money to him; at least a special action on the case should have been brought, and not an *Indebitatus Assumpsit*; and the case *Carey and Webster* is not like this, for there the plaintiff paid his own money to the servant for his master, and he paid it over accordingly.

But it is objected, that the drawback was paid to the defendant as *Corbet's* agent, and for his use.

But how could he receive that for the use of *Corbet* which was the price of his own tobacco, and received for his own use?

It is likewise said, that *Corbet* is liable to this demand. It is true, he is liable for the forfeiture for the double value for the fraud; but how is he liable for the money which he did not receive, and which the defendant received

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Where money is paid on a mistaken account, or by means of a deceit an action will also lie.

2 Burr. 1012.

2 Str. 916.

Bull. Nl. Pri.

P. 131.

1 Com. Dig.

P. 134.

Infra p. 491.

2 Lev. 183.

2d. Ld. Raym.
1210.

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Supra p. 486.

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ceived for himself, and not for him? Besides, if *Corbet* were liable, may not a person who hath two remedies take either? Or if he hath a remedy against several, may he not come against which he pleases?

As for the inconveniences alledged, though they are no greater than in the case of any subject; yet in case the law be against the defendant, they may be arguments for an alteration to the legislature, but this Court must determine according to what the law now is.

After Mr. Attorney General had finished his reply, Mr. Alderman *Perry* the defendant desired that he might speak for himself; which was allowed; and he represented the hardship of the case against him, the fairness of his dealing, the danger of his ruin, if after so many years acquiescence he should be called to an account for all monies received by him and his father on debentures, in case it should be discovered that these debentures were void. But not desiring any further argument, but referring himself to the judgment of the Court, the Court took time to consider the matter till next term.

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And on full consideration of the case, *Reynolds* Ch. Bar. *Carter* and *Fortescue* Barons, against *Thomson* Baron, were of opinion, first, That the debenture for the drawback given by *Corbet* to the defendant, by landing the tobacco in *Ireland*, became void; for no drawback ought to be made unless the goods be exported; the words of the statute 13 & 14 Car. 2. c. 11. are express, *No allowance shall be made or demanded if the goods be reloaded, &c.* And so by the statute 6 Geo. c. 21. if landed in *Ireland* the debenture for the drawback shall be void.

2. That the payment of the money to the defendant by the King's officers upon this void debenture renders the defendant answerable to the King for the money by him received; for whoever receives the King's money, without warrant or lawful authority, is accountable to the King for it. This is expressly resolved by two Chief Justices and the Chief

Chief Baron, 11 Co. 90. the Earl of *Devonshire's* case, who was Master of the Ordnance, and by Privy Seal 2 *Jac.* reciting that munition utterly decayed and unserviceable had been claimed as fees and vails to the Master of the Ordnance by reason of his said office belonging; and giving him authority to dispose of such of them as were set down in a book, &c. he had disposed of several pieces of iron ordnance, shot and munition in the said book set down; for those things being received and disposed by him by colour of a Privy Seal, which was void, because founded on a false suggestion, (for it suggests that these were fees or vails claimed as belonging to the said office, which must mean lawfully claimed and lawfully belonging, which was not true, for this was a new office erected 35 H. 8.) the Earl was accountable for them as much as if he had taken them without any Privy Seal. So in Sir *Walter (a) Mildmay's* case, cited 11 Co. 91. and reported *Cro. Eliz.* 545. *Mo.* 475. who being Chancellor of the Exchequer received 140*l.* a year for thirty years together, by warrant from the Lord Treasurer, as an augmentation of his fees, since the Court of Wards was annexed to the Exchequer, whereby his labour was much increased; but because such warrant was void, it was resolved that he should answer for the monies which he had received.

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(a) Godb. 292.
2 Roll. Abr.
161.

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And this is not from any peculiar prerogative the Crown hath above a subject, for the case would be the same with regard to a common person; whenever a man receives money belonging to another without any reason, authority or consideration, an action lies against the receiver as for money received to the other's use; and this, as well where the money is received through mistake under colour, and upon an apprehension, though a mistaken apprehension of having a good authority to receive it, as where it is received by imposition, fraud or deceit in the receiver (for there is always an imposition and deceit upon him that pays, where it is paid) by colour of a void warrant or authority, although the receiver be innocent of it.

Supra p. 488.

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Cases might be cited to warrant every part of this rule; but as the defendant appears to be an innocent person, wholly ignorant of the fraud of *Corbet* in landing the tobacco in *Ireland*, and one who thought he had a good debenture, and was lawfully intitled to receive the drawback; it is necessary to instance only cases where the party receiving thought at the time of his receipt that he had a good authority to do so, but afterwards discovers that he had not; as where a man having a grant an office or conveyance of lands, and thinking himself well entitled receives the rents and profits, it is well known that if it afterwards appear that the grant or title is not good, the receiver is chargeable by the rightful officer or owner of the land for so much money received to his use. 2 *Mod.* 260, 263. 2 *Jon.* 127 (a). 2 *Lev.* 245. 3 *Lev.* 262 (b).

(a) 1 *Freem.* 478.

2 *Show.* 21. S.C.

(b) 3 *Mod.* 239. 1 *Show.* 35. *Carth.* 90. *Comb.* 151. S.C.

The cases cited by Mr. Attorney General are strong to the same purpose. A man insuring a ship, on a rumour that the ship is lost pays the insurance, and it afterwards appears that the ship is not lost, the insured shall pay back the money.

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Supra, p. 488.

1 *Salk.* 22. And *Jacob and Allen*, 1 *Salk.* 27. 2 *Ann.* (3) By *Trevor*, Chief Justice, if an administrator authorises *A.* to collect the debts and effects of his intestate, which he receives and pays over, and then a will is discovered, the rightful executor may bring *Assumpsit* against *A.* for what he has received, as

(3) The authority of this case is much shaken by that of *Pond v. Underwood*, which is reported in 2 *Lord Raym.* p. 1210, in which the circumstances are similar, and the decision directly contrary to the present; and by Lord *Mansfield's* expressing, in the case of *Sadler v. Evans*, reported in 4 *Burr.* p. 1984: a dissent to the case of *Jacob v. Allen*, in 1 *Salk.* p. 27. and his approbation of *Pond v. Underwood*, in 2

Lord Raym. 1210. which is contrary to it. It is laid down by Lord *Mansfield*, in the case of *Stevenson v. Mortimer*, reported in *Cowper*, in conformity to the principle on which *Pond v. Underwood* proceeded, that if money is paid to a known agent, and an action brought against him for it, it is an answer to such action, that he has paid it over to his principal. P. 806.

money

money received to his use. It was there insisted, that *A.* was only agent for the administrator, received the money for his use, and had paid it to him; yet held, that the administration being void, the administrator could give no authority, and consequently *A.* received without authority, and then nothing hinders the raising an implied contract, and charging the defendant in an *Indebitatus Assumpsit*.

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So in the case of *Martin and Sitwell*, (a) 1 Show. 156. where *Barkedale* had made a policy of insurance for 5 l. premium in the plaintiff's name, and paid the money to the defendant, and it afterwards appeared that the defendant had no goods on board, upon which *Martin* brought *Assumpsit* for the 5 l. premium, and it was insisted that this was money received from *B.* and to his use; but as *Martin* was trustee for *B.* the payment by *B.* must be taken as agent for him; whereby it is plain, that there is no force in that objection, that the defendant acted as agent for *Corbet*, and received the drawback by his authority, and for his use.

(a) Holt. 25.
S. C.

But it is further objected, that *Corbet* being the person who committed the fraud, who was the exporter, and entitled to the drawback, the Crown ought to pursue their remedy against him, and not against the defendant, who was innocent, and took this money only in his own behalf, and for satisfaction of a debt owing to him from *Corbet*.

It is certain that for any penalty forfeited by the landing in *Ireland*, *Corbet*, and not the defendant, ought to be prosecuted; but when *Corbet* obtains a debenture, which he himself makes void and ineffectual, and delivers this debenture as payment for the tobacco he bought of the defendant, what need is there to resort farther than to him who had the money from the Crown? *Haffer and Wallis*, H. 6 Ann. King's Bench, 1 Salk. 28. A man marries a woman seised of lands, and takes the rents and profits, but afterwards it appears that he had a former wife then living; upon which she brings *Assumpsit* against the husband for money received to her use; and though it was objected, that the payment to him, who had

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had no authority to take the rents, was absolutely void, and that the tenants might be sued, for the money still lay in their hands, and they might sue *Wallis*; yet the Court held that the action was maintainable against *Wallis* who received the rents, and that a recovery against him would be a discharge to the tenants.

Supra, p. 486.

As to the case of *Tomkins and Barrett*, 1 Salk. 22. upon an usurious contract, the case appears to be good law; the same case is reported in *Skin.* p. 411. But there is a mistake in one of the reports, for *Salkeld* saith that it was in the Common Pleas, and came to trial before Chief Justice *Treby*; *Skinner*, that it was in the King's Bench, and came to trial before Chief Justice *Holt*; unless it can be supposed, that the same, which in both reports is said to be *H. 5 W. & M.* should after a nonsuit in one Court, be brought on to trial in the other Court; for this is an exception to the general rule, that where a man receives money for an unlawful purpose, or upon an illegal contract, he who is party to the unlawful act shall not exempt himself, and defeat what himself hath done, by falling on his accomplice, who is not more criminal than himself; as in the case there put, if a man gives money to *A.* to bribe the custom-house officers, who pays it accordingly, he shall not afterwards charge *A.* for this money as received to his use.

So if a man gives a bond upon an usurious contract, and pay part of the money, and afterwards an action is brought on the bond, to which the statute is pleaded, and the bond thereby avoided, he who paid part shall not maintain an action against the receiver, as for so much received to his use, for he was party to this usurious agreement; and though an Act of Parliament makes the bond void, yet it is only to him who claims the benefit of the statute and pleads it; for if he plead *non est factum*, or *solvit ad diem*, the plaintiff will recover; if then he pay the money, he waves the advantage of the statute; and a party equally faulty, who pays his money pursuant to a faulty agreement, ought not to have it back again; so that the reasons given by *Treby*, that the plaintiff in such case

case is *particeps criminis*, & *volenti non fit injuria*, seem not altogether so improper.

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The objection made, that in this case no privity was between the King and the defendant, was likewise made in the Earl of *Devonshire's* case, 11 Co. 90. and in Sir *Walter Mildmay's* case there cited; but it was there answered, that in the case of the Crown the law will raise and create a privity so as to render him accountable who receives any of the King's money.

And in case the defendant be chargeable, the executors will be so likewise; they were resolved so to be in both these cases.

Supra, p. 434.
485.

All the Barons agreed that the delivering up the bond could not be considered as money received to the King's use; and therefore it was adjudged by the Court, that his Majesty do recover against the said *Micajah Perry* the sum of 88 l. 10 s. 9 d. halfpenny, being so much by him unjustly received in money of the officers of the customs for the duty inwards, called the old subsidy; but as to the residue of the said 623 l. 14 s. 3 d. halfpenny in the said information mentioned, that the said *Micajah Perry* do go without a day as to such residue, saving his Majesty's right, if he shall think fit hereafter to prosecute him for it.

Bayley *vers.* Warburton and Others. In Case 212.
Scacc.

THIS was an action of ejectment on the demise of *John Crew*; on Not Guilty pleaded at the assizes at *Chester*, on the 24th of *September*, 5 Geo. 2. before the Chief Justice of *Chester*, a special verdict was found to the following effect: That the grandfather of the lessor being seised in fee, on his marriage with *Lucy * Birom*, his second wife, by lease and release, dated the 23d and 24th of *February*, 35 Car. 2. settled the lands in question *inter alia* to the use of himself for life, then to *Lucy* his wife for life, then to the issues of that marriage;

Whether a lease for years by tenant for life, in pursuance of a particular power, shall be good against him who claims in remainder.
Powell on Pow. p. 34.

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riage; then to the use of *Anne* the wife of *John Offley*, who was his eldest daughter by his former wife, and the heirs of her body, and for want of such issue, to the use of *Elizabeth*, his youngest daughter by his first marriage, and her heirs, with a power to himself to make leases.

Provided also that it may be lawful for the said *Lucy*, during her life, to demise the premises to any person for such term, with and under such conditions, rents, and reservations, in such manner to all intents as tenants in tail may do by the statute 32 H. 8. for the term of one, two, or three lives, upon and under such reservations and rents, and in such manner as a tenant in tail is enabled to do by that statute.

That *John Crew* died, leaving no issue by *Lucy*, and no children by his former wife but *Anne* the wife of *Offley* and *Elizabeth*; upon which *Lucy* entered and was seised for life; remainder to *Anne Offley* in tail, who died on the 11th of May 1711, (her husband being before dead) leaving issue *John Crew*, the lessor of the plaintiff (whose name was changed by an Act of Parliament from *Offley* to *Crew*) her son and heir.

That *Lucy* married *Edward Turner*, and after his death *William Frowd*, and that by indenture dated the 2d of June 1713, the said *William* and *Lucy* being of full age demised the premises to *John Ryland*, one of the defendants, in consideration of 26*l.* and a surrender of a former lease from *Edward Turner* and *Lucy*, on which were two lives subsisting, to hold to *John Ryland* and his heirs from the making thereof, during the lives of his sons *Richard* and *Isaac*, and *Mary Norbury*, widow, yielding 1*l.* 4*s.* 8*d.* yearly, during the term, an heriot, the best good of every person who (possessed by the force of the demise) died seised, all such boons, duties, services, averages and customs as had antiently been paid, doing suit twice a year on lawful summons, with clause of re-entry for non-payment.

That

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That at the time of this demise the premises let were not in the hand of any farmer, and were before most commonly let for 21 years; that the rent was the usual rent, and the demise was made with all the requisites necessary to be observed by tenants in tail in making leases, and according to the form of the statute 32 H. 8.

That the lessee entered; after which *Lucy* died on the 20th of *February*, 1724. upon which the lessor entered as in remainder, and made the lease mentioned in the declaration on the 10th of *May* 1726.

On this special verdict the question was, Whether this lease to the defendant was good against the lessor of the plaintiff, who claimed in remainder? And it was insisted upon that it was not; first, because the lease was made by *Lucy* and her husband, whereas the power was given to her alone, and so the power was suspended by her marriage. *Sed non allocatur*; for a power given to a single woman, if she marry, may be executed by her husband and her. Resolved on a special verdict between *Harris* and *Graham*, *Mich.* 11 *Car.* King's Bench, 1 *Roll. Ab.* 329. *pl.* 12. where a man devised to his wife for life, and by his codicil gave her power to lease for six years, she married, and her husband and she made a lease for six years; and held good. So it was resolved 1 *Sid.* 101. in Chancery, by *Bridgman* and *Hale* and the Lord Chancellor, between the Duke of *Buckingham* and Lord *Antrim* and his wife, who executed such a lease, the power being to the wife alone; the same case seems indeed reported 1 *Cha. Ca.* 17. and there it is said, that *Bridgman* held the execution by husband and wife ill; where an interest passed; otherwise, where it was a nude power; but *Hale* thought it might be fit to be argued, and the Chancellor concurring with *Bridgman*, the bill was dismissed. This case is cited in 3 *Salk.* 276. but there and in 1 *Chan. Ca.* 17. the power given to the wife to lease is said to be (being sole) and so recited 1 *Eq. Ca.* 343. *pl.* 4. (1)

1 P. Wms.
p. 155, 156.
Fort. 332.

(1) This case is also reported in 2 *Freeman*, p. 168. where we find the following words; "with power for her being sole to make leases," &c.—

If she marries, and afterwards with her husband makes a lease, upon this statement, she necessarily exceeds the power given to her.

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2. That the lease by *Lucy* and her husband ought to have been by fine, she being covert. *Sed non allocatur*; for the estate of the lessee is not derived from the lessors, but arises out of the estate of the feoffees or releasees named in the original settlement, and therefore nothing more is requisite to the raising an estate to the lessee, but what is required by the deed which creates the power, which is only an indenture signed by the party making the lease, and made in such a manner as the statute 32 H. 8. (a) requires in leases by tenant in tail; and therefore it is holden, that in leases for life made by virtue of a power no livery is needful, and it hath been doubted whether livery would not hurt; but *Hale* held it did not prejudice. 1 Vent. 281. And in the case of *Harris* and *Graham* as above, no fine appears.

(a) St. 32
Hen. 8. c. 28.

3. That this lease will not continue in force against the lessor of the plaintiff, who claims by virtue of the remainder, for the lease is to be made under such conditions, rents, and reservations, and in such manner and form to all intents and purposes, as a tenant in tail may lawfully and is enabled to do by the statute 32 H. 8.; but a lease by a tenant in tail is not good against him in reversion or remainder. Co. Lit. 44. a. 8 Co. 34. Cro. Eliz. 602. Noy 6.

A lease by tenant in tail is not good against him in reversion or remainder.

And the Chief Baron doubted hereof; but it was argued, that if such construction be made, this power of leasing is wholly insignificant, for *Lucy* had but an estate for life, and therefore every lease beyond it must have continuance against the person in remainder, and a lease determinable on her own life she might have made without the power; besides I took notice that the reasons why a lease by a tenant in tail stood not good against him in remainder, were because the lease is derived from the estate-tail, and it appears not that the statute meant to make it good against any but his issue, for the statute mentions not the donors. *Dyer*, 48. b. in the margin. But the lease here is derived out of the fee-simple vested in the releasees and their heirs, by him that had the fee, and had power to model the uses of it as he pleased, and since the statute 27 H. 8. c. 10. executes the possession

to the use in the same manner and plight, as it is limited, whence such power of making leases, &c. annexed to the estates for life becomes effectual, there is no reason why such a lease made by virtue of such a power, should not stand good against those who claim in remainder under the same settlement, and consequently subject to the power; nor do the restrictions (annexed to the power, which require that it should be made under such conditions, rents, &c. and in such a manner as a tenant in tail is enabled to make) necessarily import that it should be such in point of duration, but only that it should be attended with such circumstances as that act requires in the execution of leases by a tenant in tail. (2)

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(2) Mr. *Powell* in his Treatise on *Powers* observes, that "if a power be appendant or in gross, and the donee thereof be a feme sole, the better opinion seems to be, that she will not, by

her subsequent marriage, render herself incapable of executing the power. She being, as to her interest therein, considered in equity as a feme sole. P. 33.

Fox versf. Bardwell and Others;

Case 213.

Et e contra

Bardwell and Others versf. Fox. In Scacc.

THIS was a Bill in the Exchequer, by *Fox*, as Vicar of *Lakenham* in the county of *Norfolk*, for the tithe of hay and all vicarial tithes arising on lands in the defendant's possession from the 10th of *October* 1727, for the year following.

Unity of the possession of a manor and rectory will not exempt the demesne lands from the payment of tithes when they come

to be severed. Bunb. 327. 2 Eq. Abr. 733. pl. 7. S. C. 3 Burn's E. L. p. 464. Raym. on Tithes, p. 291.

And the case upon the depositions appeared to be this: In the time of *William* 2. the Cathedral Church of *Norwich* is supposed to have been built, and the Bishop's See removed from *Thetford* thither.

In the time of *Henry* 1. *Herbert*, Bishop of *Norwich*, granted to the Prior and Convent of *Norwich*, *Ferias quas Rex*

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Willielmus fratribus donavit in hebdomada Pentecostis, &c. Lakenham cum omnibus rebus quæ ad eandem pertinent villam præter terram Osberti Archidiaconi Ameringhale, medietatem silvæ de Thorp, &c. But this seems rather a confirmation of the grant of H. I.

In the year 1121, *Everard*, Bishop of *Norwich*, confirmed to them *omnia quæ prædecessores mei dederunt, &c. similiter quicquid Herbert de Ros habuit in Lakenham, &c.*

[499] In the year 1146. *William*, Bishop of *Norwich*, confirmed to them *omnia quæ Herbertus Episcopus Norwicensis, aut Everardus Episcopus Norwicensis donavit, & quicquid Herbert de Ros habuit in Lakenham.*

In the year 1200. *John de Grey*, Bishop of *Norwich*, granted to the Prior and Convent de *Norwich ecclesiam de Lakenham cum omnibus ad eandem pertinentibus, &c. administrari per capellanos suos, salvo nobis & successoribus nostris jure pontificali & parochiali.*

In the 16th *Hen. 3. anno 1232.* there was an *Inspeximus* and confirmation of the grants of King *William 2.* and *Hen. 1.* wherein they granted *manerium de Lakenham, Ameringhale, medietatem Silvæ de Thorp, &c.*

In the year 1273. there was a confirmation by Pope *Gregory* to the monks of *Norwich* of a grant of the church of *Lakenham*; and by the valuation of ecclesiastical benefices, 20 *Ed. 1.* & 26 *Hen. 8.* it appears that the cure was served by the monks, who received an annual pension.

By charter 30 *H. 8.* the King *Cænobiũ de Priore & Conventu Ecclesiæ Cathedralis Sanctæ Trinitatis Norwici transposuit & mutavit in Decan. & Capitulum Ecclesiæ Cathedralis Sanctæ Trinitatis Norw.*

And incorporated the Dean and Chapter, and granted them all the possessions of the priory. *Vide 3 Co. 73.*

The

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The Dean and Chapter having by this grant the manor of *Lakenham*, and likewise the church of *Lakenham*, as being part of the possession of the Prior and Convent, by lease dated the 2d of *January*, 33 *Hen.* 8. 1541. demised to *Robert Flint* the scite of the manor of *Lakenham*, and all the lands belonging, except the mills and woods, for — years, and covenanted that the lessee should have the tithes of his cattle going on the said demesnes, and that the Dean and Chapter would discharge him of all tenths, &c.

On the 1st of *March*, 1 *Ed.* 6. by indenture the Dean and Chapter, in consideration that *Robert Flint* had been at a great charge in building and repairing the houses, demised to him *Lakenham* woods; and it is declared, that whereas he held the manor of *Lakenham*, (that is to say, the scite of the manor and demesne lands, by the lease made in the 33d *H.* 8.) which it is said hath been always freed from the payment of tithes predial and personal in the hands of the farmers; the meaning was, that he should hold the said manor of *Lakenham* discharged of all manner of such tithes; and by the same indenture the Dean and Chapter demised to him the tithes of hay and corn growing on the said demesnes for 99 years.

[500]

On the 3d of *June* 1 *Ed.* 6. the Dean and Chapter surrendered their possessions to the King, who by letters patent dated the 9th of *November*, 1 *Ed.* 6. granted to the Dean and Chapter *Omnia illa maneria nostra de Hindlenoston, &c. 20 maneria in com. Norf. ac etiam omnes illas rectorias & ecclesias nostras de Hindlenoston, &c. Lakenham, &c. 25 rectorias in com. Norf. &c. Ac etiam advocaciones, donationes, jura patronatus vicariorum prædictarum ecclesiarum & earum cujuslibet, necnon omnia & singula maneria, messuagia, &c. reddit. &c. glebas, decimas, oblationes, obventiones, pensiones, portiones, advocaciones, jura patronatus, proficua & hereditamenta nostra quæcunque in villis, &c. de Hindlenoston, Newton, &c. Lakenham, &c. in com. Norf. &c. dictæ ecclesiæ cathedralis dudum spectant.*

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Except. tamen, & nobis, heredibus & successoribus nostris reservat. maner. de Hemilby ac rectoria & advocacione vicarie de Wykelwood in com. Norf. necnon omnibus & singulis messuagiis, terris, &c. decimis, redditibus & hereditamentis in Hemingby, Lakenham, &c. aut alibi dict. maner. de Hemilby, Lakenham, &c. ac rector. de Hemilby seu eorum alicui quoquomodo spectant. ac except. omnibus terris, &c. decimis jacentibus in Eaton, ac assignat. maner. de Lakenham extra dict. maner. de Eaton ac extra dict. maner. de Ameringhale ac modo in tenur. Roberti Flint.

[501]

By patent dated the 1st of July, 7 Ed. 6. the King granted to Thomas Gresham, Esq. manerium de Lakenham; ac tot. rector. & ecclesiam de Lakenham ac advocacionem & jus patronatus vicarie ecclesie ibi, &c. ac omnia & singula messuagia, grangias, &c. glebas, &c. ac decimas garbar. blador. granor. fœni & cannabi, ac al. decimas quasunque in Westacre, Lakenham, &c. dict. maner. & ecclesie seu eorum alicui spectant &c.

It does not appear that any Vicar was instituted till the year 1610. but that since then *Smith* and others have been instituted Vicars, and *Sir Nevil Catlin*, his father and grandfather, held *Lakenham* farm as assignees of the lease made to —; that *Tuck*, *Wright*, *Ward*, *Armiger*, *Menfer*, were tenants under the *Catlins* of the said farm; that the common reputation has been, that the Vicars of *Lakenham* have been intitled to all the tithes of *Lakenham*, except the tithes of corn.

That tithes have been paid by the owners and occupiers of this farm to the Vicars, or a composition for them, which was usually 8*l.* a year; that *Richard Catlin*, father of *Sir Nevil*, paid so in lieu of vicarial tithes to *Smith* the Vicar; that *Tuck*'s father held the farm several years, and paid so; that *Wright* for many years did the same; that *Ward* refused to pay, on which *Smith*'s widow sued him in the Exchequer, and had a decree 9*W.* 3. to pay tithes in kind, and being informed that *Richard Catlin* had paid 40*s.* quarterly, on the recommendation of the Court the plaintiff accepted 8*l.* a year, and

and *Ward* paid it for the time past, and for all the time afterwards which he held the said farm.

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That *Wright*, *Richard Catlin*, and his father paid so; that *Tuck* and his father paid so; that *Armiger* and *Menfer* paid so for six or seven years; that his father at first paid but 5 or 6*l.* a year for two or three years, but hearing that 8*l.* yearly had been paid, agreed to pay so, but paid only 5*l.* a year to *Hurwood*, who was an easy man; and payments by *Tuck*, *Wright*, and *Ward* were confirmed; books of *Richard Catlin* contain entries of his payment anno 1632 and 1635.

And two decrees for payment in the 9th of *W. 3. & Trin. 8 Geo. 1.* were read, the last of which was against *Bardwell*, now defendant, and *Ward* his tenant; and *Rebecca Ward* his wife said, that her husband paid 20*l.* for the tithes of the year 1720. and 22*l.* for tithes of the year 1721. and by a report in the last cause, on the 15th of *April* 1725. the defendant was reported to be indebted 20*l.* for tithes of the year —; and decreed to pay that sum and costs.

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On the defendants' part they produced, beside the charters and grants above, a lease dated the 14th of *October*, 34 *H. 8.* from the Dean and Chapter of *Norwich* to *Lawrence Stified* for fifty years, of the tithes of all corn belonging to the parsonage there, except the tithes of corn, hay, tack, and hemp belonging to the manor of *Lakenham*, wherein is recited a lease from the Prior and convent of *Norwich* for twenty years to *Ro. Piſtœ*, dated the 10th of *November*, 27 *H. 8.*

This lease to *Stified* was assigned to *Tho. Piſtœ*, and on his surrender by indenture, dated the 12th of *April*, 1 *Eliz.* the Dean and Chapter demised to *Piſtœ* the tithes of corn in *Lakenham* belonging to the parsonage there, except as before, for eighty years from *Michaelmas* then last past.

On surrender of this lease by indenture dated the 20th of *December*, 8 *Eliz.* the Dean and Chapter demised the same to *Edmund Dean*, who was assignee of — *Scriveners*, assignee of *Tho. Piſtœ*, for seventy-three years.

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By indenture dated the 14th of *February*, 12 *Eliz.* the Dean and Chapter on surrender of the last lease demised to *Lane* for seventy years.

It appears that *Lakenham* farm is part of the demesnes of the manor of *Lakenham*, and consists of thirty acres in *Lakenham*, twenty-eight acres in *Ameringbale*, the town close which lies in *Eaton*, and the rest, consisting of — acres, which lies in *St. Stephen's* parish; and it was proved by ten witnesses, and several depositions in the former causes, that *Lakenham* farm was reputed tithe free, and that no tithes in kind great or small were ever paid for it; and *Wright* and *Ward* said, that what they paid was only a free gift.

[503]

On this case it was insisted for the defendants, that *Lakenham* farm was exempt from payment of tithes either by the statute 31 *H. 8.* or secondly, by the grant 7 *Ed. 6.* or at least that the plaintiff cannot be intitled to recover any tithes, as having no Vicarage endowed.

Pollex, 3.

1. It was argued that the manor of *Lakenham*, and likewise the rectory, having been granted to the Prior and Convent of *Norwich*, there was a unity of possession, which was a foundation for an exemption by the stat. 31 *H. 8.* but this was not so much insisted on; for although it was agreed, that where a perpetual unity continued to the time of dissolution, by force of the statute 31 *H. 8.* it was a good ground for exemption of those lands from tithes in the hands of the patentees; yet here was no proof that the priory of *Norwich* was one of the greater houses that came to the Crown 31 *H. 8.* and it is evident that they were in the Crown before, and consequently by surrender, or by the statute 27 *H. 8.* for by letters patent 2 *May* 30 *H. 8.* the King changes the Prior and Convent of *Norwich* into a Dean and Chapter, and transfers to the Dean and Chapter of *Norwich* all the possessions of the priory.

Now no lands belonging to religious houses that were dissolved by 27 *H. 8.* were exempt from tithes; and unity
of

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of possession was not in itself any discharge for the tithes, being collateral to the land, as soon as the unity ceased, the right to tithes revived accordingly. It appears, that the Dean and Chapter of *Norwich* having the possessions of the priory, immediately made leases of the tithes. By indenture, dated the 2d of *January*, 33 *H. 8.* they demised the manor of *Lakenham* to *Flint*, who in consequence was bound to pay tithes to the Rector the lessor, and on the 14th of *October*, 34 *H. 8.* they demised all the tithes of corn belonging to the Rectory to *Law*. Stisted for fifty years, to commence after a prior lease of them by the Prior and Convent, dated the 10th of *November*, 27 *H. 8.* to *Rob. Piſcoe* for twenty years; so it is plain that they did not then look on the tithes to be extinct, or the manor of *Lakenham* to be exempt from the payment of them.

It is true, in the lease to *Flint* the Dean and Chapter covenant that he should not pay tithes for his cattle agisted on the demesnes of the manor, which covenant shews that without it tithes might have been demanded for the agistment of his cattle. In the lease to him, dated the 1st of *March*, 1 *Ed. 6.* it is declared indeed, that the manor of *Lakenham* had been always freed from tithes predial and personal in the hands of the farmers, and on that account it was explained that he should not be charged for any such tithes, and that the predial tithes of the demesnes are demised to him for ninety-nine years.

[504]

But though this be insisted on as an argument that the demesnes were always discharged of tithes, yet if a construction be made according to the import of the words, it seems rather to infer the contrary: it is very likely that the Prior and Convent, when they leased out any part of their lands, leased them free from the payment of tithes, in order to gain the higher rent, and therefore in the lease of the manor of *Lakenham*, or any part of the demesnes, they exempted them from paying any predial or personal tithes; but this was an exemption that was not inherent in the lands, but was the effect of their covenant to excuse them:

when

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when therefore the covenant in the lease 33 H. 8. excused only the tithes of the cattle agisted on the demesnes of the manor, that was not equivalent to what the former tenants were excused from, and therefore in the lease 1 Ed. 6. it was declared that the meaning was to excuse him from all predial and personal tithes, but not from all tithes whatsoever; and therefore the predial tithes only were demised to *Flint* for ninety-nine years, but all mixt tithes, with which the Vicar is usually endowed, were still payable by him; the covenant to discharge all tithes, was meant only to exempt from the tenths payable by the statute 26 H. 8. and not to excuse from any other tithes.

2. But the thing mainly insisted on is, that by letters patent, dated the 7th of Ed. 6. the King granted to *Thomas Gresbam*, the manor of *Lakenham*, *ac totam rectoriam & ecclesiam de Lakenham, ac advocationem & jus patronatus vicarie ecclesie ibidem, ac omnia messuagia, &c. glebas, decimas in Westacre, Lakenham, &c. dicti maner', ecclesiis seu eorum alicui spectan', &c.*

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Whence it is inferred that the plaintiff, collated to the Vicarage by the Dean and Chapter, can have no right to the tithes, at least not to the tithes arising from the manor of *Lakenham*.

And although it was answered, that by the letters patent dated the 1st of Ed. 6. the King had granted the Rectory of *Lakenham* and Advowson of the Vicarage to the Dean and Chapter, and consequently the subsequent grant to *Thomas Gresbam* is void; yet it was urged that in that grant there is an exception of all tithes in *Lakenham* to the manor of *Lakenham* belonging; as therefore the demesnes of *Lakenham* have always been reputed exempt from tithes, and it came to the Crown tithe-free, and those tithes by this charter are granted to *Thomas Gresbam*, the plaintiff cannot be intitled to them.

But it is evident by what is before said, that the manor of *Lakenham*, and other possessions of the Prior and Convent
of

of *Norwich*, came not to the Crown by the statute 31 H. 8. but were in the Crown before, either by surrender of the Prior and Convent, or by the statute 27 H. 8. and consequently did not come to the Crown tithe-free; but in reality, although the manor of *Lakenham* and the rectory of *Lakenham* had been long united, upon the severance of them the right of tithes revived; when therefore King *Ed. 6.* in the first year of his reign granted to the Dean and Chapter of *Norwich*, the Rectory of *Lakenham*, all tithes in the parish of *Lakenham* became due to the Dean and Chapter, as well those arising out of the demesnes of the manor as elsewhere, and the exemption doth not extend to any tithes, parcel of that Rectory; but first, the King having granted several manors, rectories and all other hereditaments in *Lakenham* or elsewhere in the county of *Norfolk*, which heretofore belonged to the cathedral church of *Norwich*, he excepts out of this grant the manor of *Lakenham*; but this amounted not to an exception of the Rectory (if it had been appendant to the manor, as it was not) because the Rectory was expressly granted away before: then he excepts all tithes to the manors of *Hemilby*, *Lakenham* and rectory of *Hemilby*, *aut eorum alicui spectant*; but this doth not except the tithes of the demesnes of *Lakenham*, which were not belonging to the manor but to the rectory of *Lakenham*, for the tithes are collateral to the land; besides it does not import any tithes belonging to the manor, for it comes in with general words *belonging to the manor or rectory of Hemilby or any of them*, so that it excepts not any tithes belonging to the manor, unless it otherwise appear that there were any such: the next branch of the exception indeed seems to import that there were tithes belonging to the manor, since it excepts all tithes in *Eaton*, assigned to the manor of *Lakenham* out of the manor of *Eaton* and out of the manor of *Ameringhale* now in the tenure of *Robert Flint*; and it seems probable that there might be some portion of tithes granted before the Council of *Lateran* out of *Eaton* and *Ameringhale* and annexed to the manor of *Lakenham*, because in the lease to *Stisted* in the 34th of H. 8. of the tithe
corn

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corn belonging to the parsonage of *Lakenham*, there is an exception of the tithe of corn, hay, tack and hemp belonging to the manor of *Lakenham*, which were probably excepted out of *Stiffed's* lease, because they were before demised to *Flint*; and perhaps by the leases of the site of the manor of *Lakenham* 33 H. 8. and 1 Ed. 6. and the demesne lands, they might be thought to be comprehended in the general words, but whether they were in the tenure of *Flint* by those leases or any other, the exception of the tithes lying in *Eaton*, & assignat' & appunctuat' manerio de *Lakenham* extra maner' de *Eaton* & maner' de *Ameringbale*, cannot except the tithes arising out of the demesnes of *Lakenham*, and belonging to the rectory of *Lakenham*.

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And if those tithes be not excepted out of the grant 1 Ed. 6. they could not pass to *Thomas Gresbam* by the grant 7 Ed. 6. they could not pass as part of the Rectory, being granted 1 Ed. 6. to the Dean and Chapter; neither could they pass by the grant 7 Ed. 6. for the King was deceived, and his grant to *Thomas Gresbam* as to the Rectory of *Lakenham*, and the advowson of the Vicarage, and the tithes belonging to the church of *Lakenham*, was void; it may possibly stand good as to any tithes in *Eaton*, or assigned out of the manors of *Eaton* or *Ameringbale* to that of *Lakenham*.

I need not cite cases to shew that an exception doth not extend to exclude out of a grant what is expressly granted. 2 Rol. 454. sec. 8. A man seised of the manors of C. and D. of which *Blackacre* is part of the manor of C. but lies near D. and is enjoyed with and reputed parcel of D. he grants the manor of D. and all lands reputed parcel of it, except the manor of C. *Blackacre* is not excepted, being expressly granted as parcel of the manor of D. under the words *all lands reputed parcel of that manor*.

Suppose King Ed. 6. had granted to *Thomas Gresbam* the manor of *Lakenham*, the rectory of W. and all lands; tithes, &c. to the said manor and church or either of them belonging, and afterwards had granted the Rectory of *Lakenham*,

cum omnibus juribus, membris & pertin' diē' ecclesiæ Cath' dudum spectan'; I apprehend that the tithes of the demesnes of the manor belonging to the Rectory would not have passed to *Gresbam*; it would be like the case *Mo. 426.* where the Abbot of *Abingdon* seised of the hundred of *H.* and the leet belonging, and other lands which came to the Crown on the dissolution, the King grants to one *Lions* part of those lands, and all leets *infra præmissa*, and afterwards grants the hundred of *H.* and leet belonging, to Lord *Norris*; it was holden that the leet passed by the last, not by the first grant.

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Thirdly, But in the last place it is said that here was never any Vicarage endowed, for the cure was supplied by the monks who had a salary allowed them, and consequently the plaintiff cannot recover, for the Vicar cannot be intitled to tithes unless endowed of them, and the endowment must be proved by an endowment produced, or else by prescription; but here is not any endowment produced, and there can be no prescription, because it was shewn when there was none, for there was no pretence of any Vicar, or of tithes paid to him till the year 1610.

Hardr. 328,
329.

But it was answered, it may be difficult always to shew the exact time when a Vicarage first commenced, or when it was first endowed.

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By the constitution of *Ottobon 21 Apr. 52 H. 3. Universi religiosi, qui ecclesias in proprios usus habent, si vicarii non sunt positi in eisdem infra sex mensum spatium, vicarios diocesani præsentare non omittant, quibus sufficienter pro facultate ecclesiarum assignent portionem, alioquin diocesani id facere studeant.*

Therefore though the church of *Lakenham* was appropriate before the statutes 15 R. 2. and 4 H. 4. c. 12. which require that on appropriations care be taken that there should be a Vicarage endowed, or otherwise the appropriation shall be void; and it was insisted that those statutes extend only to the time future, and consequently on this appropriation there might be no endowment of a Vicar; and it is most probable

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probable that it was not, because the monks supplied the cure till the dissolution, and had no tithes but an annual pension; yet it appears by this constitution that the religious were obliged to create a Vicar and endow him, otherwise the Bishop was required to do so; and this construction extends to all precedent appropriations, and therefore the presumption is, that there was a Vicar endowed pursuant to this construction.

How the cure came afterwards to be supplied by their own monks does not appear; perhaps those monks might be presented and instituted, though they are called *Capellani*; or perhaps the Pope might by bull allow the prior to appoint one of his monks to officiate and serve the cure, as in the case of *Briton* and *Wade*, (a) 2 *Cro.* 515.

(a) 2 Roll. Rep.
97. 127.
Palm. 113.
S. C.

The prior of *Deintree* had the advowson of *Norton* appropriate, and the Vicarage was endowed with the altarage and small tithes, and so continued till the reign of *H. 6.* when on the petition of the Prior to the Pope, in regard that the Priory was poor, the Pope granted *quod de cetero* the Prior should constitute one of his monks to officiate in the cure, and so it continued to the dissolution; but held this did not dissolve the Vicarage.

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It is true, that this was an endowment after the stat. 4 *H. 4.* but though this was a reason given, that the Pope could not dissolve a Vicarage after that statute,

Yet it was also resolved, that it could not be done by the Pope, though the ordinary might do it.

It is certain that the Vicarage of *Lakenham* is mentioned in the patents 1 *Ed. 6.* and 7 *Ed. 6.* so that the church was looked upon to have a Vicarage then.

And though it does not appear how the endowments originally were, it is certain that they were oftentimes uncertain and variable.

At

At first the endowment might be small and afterwards enlarged. *Selden in his History of Tithes*, saith, speaking of the first appropriations,

“ Nor was there any perpetual certainty of the profits of their presentee (that is the person, the appropriate person presented to any vicarage) till the monks by composition with the ordinary, or by their own ordinance, (which prescription after confirmed) appointed some yearly salary in tithes or glebe, or rent, for the perpetual maintenance of the cure; which salaries became afterwards the endowments of perpetual Vicarages.” *Selden's Works*, Vol. III. p. 1262.

Crimes & al' v. Smith, 12 Co. 4. in the Exchequer. The case was, The Abbot of *Salby* held the parsonage of *Lubbenham* in the county of *Leicester* as appropriate, which came to the Crown by the stat. 31 *Hen.* 8. who in the thirty-seventh year of his reign granted it in fee-farm, under which the plaintiff claimed; the defendant got a presentation from Queen *Elizabeth* to this church, and insisted, that the impropriation was made 22 *Ed.* 4. and no endowment of a Vicarage, and consequently the appropriation void; and there was no instrument or direct proof of any endowment. But since, during the appropriation supposed, there had been a Vicar inducted, as a Vicar rightfully endowed, it was resolved by the Court, that the Vicarage, in respect of its continuance, was rightfully endowed.

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And the Court said, that it would be dangerous to examine into the original of impropriations of Parsonages and endowments of Vicarages.

In the present case there is a proof of payment of vicarial tithes to the Vicar for near 100 years, while *Richard Catlin*, *Tuck*, *Wright*, *Ward*, *Armiger*, *Menfer*, held this farm, and a constant reputation, that all tithes but of corn belonged to the plaintiff; and two decrees of this Court in his favour, which raise a strong presumption for him.

Hardr. 328,
329.

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It is possible that the endowment at first was but small; that some pension was paid to the incumbent; that when the Dean and Chapter had the parsonage, they might vary or augment the endowment of the Vicarage in *Flint's* lease 33 E. 8. the demise of predial and personal tithes only, looks like a reservation of the rest for the Vicar; and the prescription, which is evidence of an endowment, need not to be such as admits no proof when it was not paid; for the endowment may be within time of memory; but a prescription allowed by the canon law of sixty years or thereabouts, is a time sufficient to induce a belief that there was some foundation for the payment, though it does not appear exactly when such payment began.

Besides, there was on the 6th of *November*, 1735. to which the debate of the cause had been put over, further evidence given of several presentations by the Dean and Chapter to the Vicarage, and the Vicars instituted thereon, some of which were said to be in pursuance of the constitution of *Ottobon*.

The first institutions were in 1312, which were followed by others in 1327. 1359. 1361. 1375. 1386.

[511] In the year 1569. there was a sequestration granted of the profits of the Vicarage by the Bishop, in order to supply the cure in the vacancy, and *anno* 1610 there was a presentation again.

Besides, there were accounts produced of the chamberlains or treasurers of the Priory in the time of R. 2. and H. 6. wherein they account for 5*s.* *de terris pertinen'* vicario de *Lakenham*, 41*l.* 4*s.* three farthings *de ecclesia de Lakenham*, 14*l.* *de manerio cum decimis*, & 19 R. 2. *de manerio* 20*l.* *de decimis* 4*l.*

It was further proved, that the reputation was, that the Vicar had tithe-hay as well as other vicarial tithes, and that the payment of the 8*l.* yearly by *Catlin*, *Wright*, &c. was reckoned to be for the tithe of hay, clover, turnips, and
all

all other small tithes, and that tithe had been once paid in kind to the Vicar.

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It was further insisted, that the vicarage or rectory of *Lakenham* came not to the Crown either by the statute 31 H. 8. or 27 H. 8. but the King 30 H. 8. translated the priory and convent to a Dean and Chapter, and transferred the possessions of the priory to the Dean and Chapter; so that these possessions not being surrendered to the Crown, nor vested in the Crown by any act of parliament, there could not be any exemption from tithes; for unity of possession cannot be an exemption longer than the unity continues, and it is only by force of penning the clause in the stat. 31 H. 8. that the lands given to the Crown by that statute are discharged, where there had been a perpetual unity till the dissolution by that statute.

And the Court was of opinion, that unity of possession of the manor and rectory of *Lakenham* in the hands of the prior and convent, and afterwards of the Dean and Chapter of *Norwich* till 1 Ed. 6. did not exempt the demesnes of the manor from tithes when they came to be severed.

That by the letters patent, dated the 9th of *November*, 1 Ed. 6. the rectory was granted to the Dean and Chapter of *Norwich*, and consequently the grant of it by the patent 7 Ed. 6. to *Thomas Gresham*, Esq; was void; and although there was an exception in the grant 1 Ed. 6. of the manor of *Lakenham*, rectory of *Hemilby*, &c. and all lands, tithes, &c. to the said manors, rectory, *aut eorum alicui quoquomodo spectant*, that did not except any tithes, parcel of the rectory of *Lakenham* which was before expressly granted to the Dean and Chapter, much less the tithes belonging to the vicarage.

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That the reputation of tithe hay and all vicarial tithes belonging to the Vicar, and the payment of them by the rest of the parish, and the payment of the 8*l.* yearly, or some other sum, as a composition for them by the owners and

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occupiers of *Lakenham* farm above 100 years, and the two former decrees in favour of the Vicar, was a sufficient evidence of some antient endowment.

And the Court decreed that the defendant should account with the plaintiff for the tithes demanded by the bill, and that the defendant's cross bill should be dismissed with costs, which upon an appeal to the House of Lords in *March* 1735-6 was affirmed, with 200*l.* costs.

Termino Pasch.

9 Geo. II. In C. B.

Roger Acherley *vers.* Bowater Vernon. (1)

Case 214.

IN an action for debt for 5700 *l.* the plaintiff declares, that whereas *Tho. Vernon*, Esq. being seised in fee, by will dated the 17th of *June* 1711. devised to his wife out of the manor of *Shrawley*, and other lands and tenements in the county of *Worcester*, an annuity or rent-charge of 1000 *l.* a year for her life, clear of all charges, except parliamentary taxes, in lieu of her jointure.

The non-performance of a condition, tho' in its nature subsequent, is sufficient to bar the plaintiff's title to whatever he claimed upon such condition.
Fort. 188. S. C.

And by the same will devised to his sister *Eliz. Acherley* the plaintiff's wife 200 *l.* a year out of rents of his said real estate, to her own hands for her separate use, exclusive of her present or any future husband; and to be made up 400 *l.* a year from his wife's decease, during his sister's life.

And after a devise of other estates to *William Vernon, &c.* he devised all the residue of his real and personal estate (his debts, legacies, and funeral expences first paid) unto his brother *Roger Acherley, Geo. Vernon, Geo. Wheeler, John Bearcroft*, and *Richard Vernon*, their heirs, executors and administrators, upon trust and confidence, that after the annuities and annual rents before devised to his wife and sister, &c. paid,

(1) This case is much more fully and satisfactorily reported in *Fortescue*.

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the said trustees should invest the residue of his personal estate in the purchase of lands, &c. and should stand seised of all his real and personal estate, during his wife's life, to the uses and purposes in the said will; and after the decease of his wife (in case he die without issue then living) should stand seised of all his manors, messuages, lands, tenements, and hereditaments, and lands to be purchased with the surplus of the personal estate, and should settle the same to the use of *Bowater Vernon* for ninety-nine years, if he so long live, with remainders over, &c.

And directed, that his trustees during his wife's life should pay the clear surplus of the profits of his real and personal estate, after payment of the said annuities, debts, &c. to the said *Bowater Vernon* for so long time as he should live, and after his decease, to his first and other sons in tail male, &c.

And whereas by a codicil dated the 2d of *February* 1720. *Thomas Vernon* the testator having purchased other lands, devised the same to his trustees and executors, subject to the same trusts or same uses to which he had devised the bulk of his estate, &c.

Then revoking that part of the will which appoints *Roger Acherley*, *George* and *Edward Vernon* three of his trustees, he desires *Frances Keck* and *John Nichols* to be two of his trustees. (2)

(2) Then says in his codicil, according to the report in *Fortescue*, that he had made a will of the date aforesaid; and then says, I hereby ratify and confirm the said will, except in the alteration hereafter mentioned; and I will that the portion to my niece *Lætitia*, daughter of my sister *Acherley*, shall be made up 6000*l.* and then goes

on, But my will is that what I have so given to my sister and niece be accepted by them in lieu and satisfaction of all they or either of them might claim out of my real or personal estate, and upon condition that they release all right and title, &c. to the executors and trustees of my will. *Supra*, p. 381. *Infra*, p. 516. 521.

And

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And whereas the testator died on the 5th of *February* 1720. seised, &c. after whose death *Roger Acherley* and *Elizabeth* his wife were seised of the said rent devised to *Elizabeth* in demesne as of freehold, in right of the said *Elizabeth*, by virtue of the said devise. And *Bowater Vernon* entered into the said manor, &c. out of which, &c. and hath been ever since tenant of the demesne thereof, and 1900*l.* for nine years and a half, ended on the 5th of *February* 1731. in the life-time of the said *Elizabeth Acherley* and *Mary Vernon*, became due to the said *Elizabeth* for the said yearly rent, and is yet unpaid.

And the said *Elizabeth* died on the 3d of *May* 1732. and *Mary Vernon* died on the 5th of *July* 1733. whereby, and by the death of *Elizabeth*, and by force of the statute an action accrues to the plaintiff, her husband, to demand the said 1900*l.* part of the said 5700 *l.*

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In the second count the plaintiff declares, that whereas *Thomas Vernon* being seised in fee of the manor of *Sbravoley*, &c. by will dated the 17th of *January* 1711. devised to *Elizabeth* the wife of the plaintiff 200*l.* a year to be issuing out of his real estate, &c. for life, and died on the 5th of *February* 1720. after whose death the plaintiff and his wife, in right of his wife, were seised of the said yearly rent, and *Bowater Vernon* entered into the said manor, and hath ever since been tenant of demesne, and 1900*l.* for nine years and a half's rent ended on the 5th of *February* 1731. became due to the said *Elizabeth* in her life-time, and in the life-time of *Mary Vernon*, and then *Elizabeth* died on the 3d of *May* 1732, whereby, and by force of the statute, the plaintiff became intitled to demand the said 1900*l.* other part of the said 5700 *l.*

The third count was to the same effect, on a devise by a codicil dated the 2d of *February* 1720; to which the defendant pleads he owes nothing.

And on the trial at the sittings, on the 24th of *February*, 8 Geo. 2. before Chief Justice *Eyre*, a verdict was agreed to for

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for the plaintiff on the first count, and on the rest for the defendant.

And it was farther agreed that the plaintiff should insert in the declaration the condition of the codicil, which devised to *Latitia A.* and whatever was contained in the will or codicil which the defendant should think necessary; and if the Court were of opinion for the defendant, that the plaintiff should pay the costs of a nonsuit.

Serjeant *Skinner* for the defendant.

The case principally intended to be referred to the consideration of the Court is this:

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Thomas Vernon devises 200*l.* rent-charge to his sister, the wife of the plaintiff, for her life for her separate use, to be issuing out of his real estate, and devises his real estate to trustees, on trust that the rent-charge being first paid, after his debts and legacies satisfied, they should stand seised, during his wife's life, to the uses of his will, and to enable them to perform it; and directed them, during this wife's life, to pay the clear surplus of the profits, after the said annuities, debts, legacies, &c. deducted, to the defendant so long as he should live, then to his sons, &c. and after the death of the wife to stand seised, and settle the same on the defendant; &c. the defendant enters on the death of the testator, and hath ever since received the profits as tenant; the plaintiff's wife dies. Whether the plaintiff can maintain debt against the defendant for the arrears of this rent-charge during the coverture,

By the stat. 32 *H. 8. c. 37. f. 3.* if any in right of his wife hath an estate for life in any rent, and the same be unpaid in the wife's life-time, the husband after her death shall have debt against the tenant of the demesne who ought to have paid the same.

2dly, It was insisted, that by the codicil it is said, but my will is, that what I have so given to my sister and niece be accepted

cepted in lieu of all, either might claim out of my real and personal estate, and upon condition that they release all right, &c. to my executors and trustees of my will.

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This clause makes the release a condition precedent, and it is agreed by the case, that the right is not released.

That the condition precedent must be shewn to be performed, or nothing vests, appears by the cases that are mentioned. 1 *Rol. Abr.* 415. *f.* 11. *Pl. Com.* 30. 2 *Vern.* 340. 1 *Sand.* 215.

Performances
must be shewn
of a condition
precedent, or
nothing vests.
Fort. 190. *S. C.*
7 Co. 10. *a.*
Infra. p. 732.

And this must be a condition precedent as to the legacy to the niece; and shall the same words make the same condition precedent to the niece, and not to the sister?

Serjeant *Eyre*, *contra*, The words of the codicil must be taken distributively. 2 *Vern.* 478.

[517]

Whether a condition be precedent or subsequent, must be collected from the intent of the testator, to be collected from the words of the will. *Win.* 115. *Cro. Eliz.* 219. (a)

Forr. 166.

(a) 1 *Leon.* 229.
S. C.

Now here the devise of the annuities precedes the devise of the real estate.

But if the will and codicil be connected together, still the annuity to the testator's sister is devised first on condition; it is said that the words make it a condition precedent, as to a release from the niece; but I submit that it was subsequent to the niece, for it is taken notice of, that the niece was under age at this time.

It is not to be understood that he meant void releases to be made, he knew that his sister was married, and niece under age, and neither, the testator knew, could then release.

Besides the testator saith my will is, *That the annuity so given be accepted, &c.* then adds, *having thus provided for my sister*
and

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and niece, &c. which shews that he looked on the provision made at present before any release.

In case it be a subsequent release, it is then become impossible by the act of God, by the death of the wife during coverture; and consequently non-performance cannot avoid the annuity.

Serjeant *Skinner* in reply, This must be a condition precedent, as it is annexed to an annuity which is executory, and consequently must cease if not released.

Afterwards in *Trin.* 9 & 10 Geo. 2. it was argued by Serjeant *Chapple* for the defendant, who insisted,

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First, That the annuity was given by the testator to his sister on a condition precedent, which is not averred to be performed.

Secondly, If not, yet the annuity ceased by non-performance of the condition.

As to the first, It appears that the 200*l.* a year was not given absolutely, but upon a condition, and if she had no estate in her, the plaintiff, as her husband, cannot by the statute 32 H. 8. c. 37. maintain an action for the arrears.

Now the words require something to be done previously; the words are in the present tense, be accepted on condition she do release, not if she shall accept or shall release.

There is a difference between a devise of land, and of an annuity that is executory. 7 Co. 10.

The intention of the testator must be the rule to construe the words, and if the testator had been asked when she should have the annuity, he would have said when she released her right.

No part of the annuity can be paid till the end of six months, for it is payable half-yearly. Co. Lit. 208. Where a condition

tion concerns a transitory act, without limiting a convenient time, it must be done presently, that is, in convenient time, considering the nature of the transaction. 2 Co. 79.

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Now, if she takes the annuity, and afterwards refuses to release, she hath the annuity, though the testator intended it in lieu and satisfaction of her claim to the estate.

Being a married woman will not alter the case, for if it does not vest till the act is done, she might have levied a fine. 10 Co. 43. a. Ow. 25. shews that doing all she could do, had been a good performance; Lat. 10. if she had levied a fine, though the husband had dissented, it might possibly have been good.

Marriage, infancy, &c. is no excuse. 1 Rol. Abr. 421. [519]
1 Vent. 199.

If she had executed a release, it had shewn her willingness to do all that she could, though not effectual.

In Pasch. 1730. on a bill in Chancery by Mrs. Acherley against the trustees and defendant for this very annuity, it was decreed, that on executing a fine the arrears should be paid to her.

In January 1733. Grangier, as administrator to his wife, exhibited a bill for the arrears of this annuity.

But on the 16th of May 1734. the bill was dismissed by the Master of the Rolls, because it did not alledge that they had released.

Serjeant Wright, *contra*, What has been done in Chancery is no more, than that that Court would not preclude a remedy at law, unless they would comply with what was reasonable to be done on their part.

But here is no condition at all by the will; then the words in the codicil are *What is so given be accepted*, &c. these words suppose that it was given.

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VERNON.

Besides the 200*l.* was not to be in lieu of her right, but the 400*l.* a year, and then a release was to be executed.

So the 1000*l.* made up 6000*l.* to the niece was not to be in satisfaction of her right, nor was she bound to release on payment of 1000*l.* till the 6000*l.* was paid.

Then the release could not be required till the whole benefit of the devise took effect.

Objected, She should have done what she could.

Answered, What she could not lawfully do she was not bound to do.

[520]

But this must be a condition subsequent; he designed his sister an immediate and present maintenance, prior to any estate given to others.

Secondly, She was to release to trustees, who had no estate but what was subsequent to her's.

In the case 1 *Roll. Abr.* 415. 16. *f.* 12. the condition was holden to be subsequent, because to be performed at a day future.

So in 3 *Lev.* 132.

Objected, That there was a difference between a devise of land, and an annuity which is executory. But no difference exists but where the condition is executory.

Thirdly, If the condition be subsequent, it is become impossible by the act of God, the sister dying before the wife.

In this case I think the devise of 200*l.* a year is not upon a condition precedent, if it had stood upon the words of the will, it is evident it was intended to be given to her immediately upon his death, for it was to be paid to her half-yearly during her life, and exclusively of her present husband as well as of any future husband, and when she survived his wife it was to be 400*l.* a year.

Then

Then he devises his estate at *Hertington* in *Lincolnshire*, paying out of it 100 l. a year to his trustees during his wife's life, the better to enable them to pay the said annuities.

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Then he gives all the rest of his real and personal estate, after payment of his debts, legacies and funeral expences, to his trustees, &c. on trust to pay the annuities before devised to his sister and wife first, and after payment of all debts, &c. to lay out the residue in a purchase, &c. And that the trustees should pay the said clear surplus after the said annuities, &c. to the defendant *Bowater Vernon*.

So that upon the will the annuity to his sister undoubtedly vested presently, without any condition precedent.

[521]

Then by his codicil he first ratifies his will, except in the alterations after-mentioned, and then makes his niece's legacy 6000 l. which before was but 1000 l. and then adds the proviso insisted on,

But my will is, That what I have so given to my sister and niece be by them accepted and taken in lieu of all they may claim out of my real and personal estate, and on condition they release all such right to the executors and trustees of his will.

Now the words of this proviso do import the bequests to his wife and niece to be antecedent to what is required to be done by the proviso.

That which is required to be done is, that the gifts be accepted in lieu of all they claim out of his real and personal estate, and on condition that they release such right to his executors and trustees; it must be given before it can be accepted, and the acceptance must precede the release.

So that in this case the release cannot be prior to the devisee's acceptance of it, in lieu of all other interests which they may claim out of the estate,

Secondly,

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Secondly, The devise is by the will, this proviso by a codicil annexed to the will; so that the proviso did not intend to defeat the will, but to add a condition to the devise thereby made; and therefore the wording of the codicil is, *What I have so given*; which imports, that the legacies were already given to which this condition is annexed.

It is objected indeed, that with respect to the niece the release must be antecedent.

[522]

But I do not see any necessity for such construction, the legacy of 1000*l.* is made up 6000*l.* by the codicil; no doubt she will accept the 6000*l.* rather than the 1000*l.* but then she must release all other rights to the estate; but such release may be subsequent.

I see nothing in the nature of the thing, why this should not be made afterwards as well as before.

But the legacy given to the niece of 1000*l.* by the will is to be paid at the age of eighteen, or at her marriage, and this is confirmed by the codicil, in case she release her right to the estate.

But she could not release till the age of twenty-one, and consequently her legacy was payable before she could release.

The condition therefore that she should release must be subsequent to the legacy devised.

And if it be subsequent as to the niece, the same words will not make a condition precedent as to the one, and subsequent as to the other.

Chief Justice *Reeve* thought it a condition subsequent.

But the Judges doubting, it was adjourned; and afterwards in *Easter Term*, 12 *Geo. 2.* *Willes* Chief Justice, and the whole Court inclined to think it a condition precedent; but held, that supposing it to be a condition subsequent, yet not being performed,

performed, the plaintiff was not intitled to the arrear of the annuity; and therefore the verdict was set aside, and the plaintiff obliged to pay the costs of a nonsuit.

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VENNOM.

Bluet, *qui tam*, &c. *vers.* Needs. In C. B.

Case 215.

Entered Trin. 7 & 8 Geo. II.

BL UET Clerk, *qui tam pro pauperibus quam pro se ipso*, exhibits his bill on the 23d of *January*, in *Hilary Term* last, against the defendant, an attorney of this Court, for 40*l.* debt, for that at *Holcomb Regis*, in the county of *Devon*, on the 28th of *November* 1733.* the defendant did use a gun to kill and destroy the game, whereas he was not qualified so to do by the laws of the realm; whereby an action accrued to the plaintiff to demand 5*l.* part of the said 40*l.*

In an action *qui tam* on a statute, it is sufficient to say that a person is not qualified, without shewing that he had not 100*l.* a year, or any other estate which makes a qualification. In a conviction it is otherwise. a Burn's Just. p. 323.

Secondly, That on the 16th of *January* 1733. he did keep another gun to kill and destroy the game, not being qualified, &c. for which an action accrued for other 5*l.*

[* 523]

Thirdly, That on the same day he exposed to sale six hares against the form of the statute, whereas he was not qualified in his own right to kill game; whereby an action accrued to demand 30*l.* residue of the 40*l.*

Defendant pleads that he owes nothing; and in arrest of judgment moved,

First, That the first count is not good; since by the stat. 5 Ann. c. 14. sec. 4. it is enacted, That if any person, not qualified by the laws of this realm so to do, shall keep or use any greyhounds, setting dogs, hays, lurchers, tunnels, or any other engine to kill and destroy the game, and shall be convicted, &c. before a justice of peace, he shall forfeit 5*l.*

But

BUT
NEEDS.

Infra 525. 577.

But a gun is not mentioned in this act, and therefore when by the statute 8 Geo. c. 19. it is enacted, That persons liable to be proceeded against before a justice of the peace for any pecuniary penalty or sum for any offence against the law for the preservation of game, may be proceeded against by information before a justice of the peace, or by action of debt, or in case, &c. before the end of the next term after the offence, &c. But debt lies not unless the offence be within the statute 5 Anne, c. 14.

Secondly, It is not sufficient to say that he was not qualified, without shewing that he had not 100*l.* a year, or any other estate which makes a qualification.

[524]

In the case of *the Queen v. George*, 6 Mod. 40. in the Queen's Bench, 2 Ann. It was holden that a conviction on the statute 4 & 5 W. & M. c. 23. shewing that the defendant *existens persona dissoluta*, &c. did hunt and kill so many hares, &c. ought to be quashed, because it did not shew that he was not qualified.

Thirdly, The selling six hares together is but one offence; and by the statute 9 Ann. c. 25. which enacts, That if any person whatsoever, not being qualified in his own right to kill game, shall sell or expose to sale any hare, pheasant, &c. he shall forfeit for every offence such penalty as on higglers, &c. by the statute 5 Ann. c. 14. is inflicted (*viz.*) the sum of 5*l.* which ought not to be understood 5*l.* for every hare, pheasant, &c. but for all sold at once; but the penalty on higglers, &c. by the stat. 5 Ann. c. 14. is the sum of 5*l.* for every hare, pheasant, &c.

As to the first objection, a gun is an engine to destroy the game.

Supra p. 278.

So as to the second objection, we have exactly pursued the words of the act; and if the defendant had been qualified, he must shew it.

As

As to the third objection, that all is one offence, the statute 9 *Ann.* refers to the Statute 5 *Annæ*, which gives 5*l.* for every hare, &c.

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NEEDS.

Supra, p. 278.

And though it be objected now at last, that the Jury finds but 10*l.* without shewing to which of the offences it is to be applied; it is to be observed, that this is an action of debt for 40*l.* and the several offences after mentioned make up that sum; and the Jury may find that the defendant owes but part of the debt.

Infra p. 577.

And *per Cur'*, As to the first objection, the averment of his not being qualified is sufficient, since the words of the act are pursued; and the defendant may come and shew his qualification.

[525]

Indeed convictions have been quashed for not setting forth what was his want of qualification; because it must be made out before the Justice, that he had no such qualification as the law requires; and therefore the Justice ought to return, that he had no manner of qualification, before he can convict the defendant.

1 Burr. 148.

2 Ld. Raym.

1415.

1 Str. 66.

Dougl. 345.

1 Term Rep.

127.

As to the second, this is after a verdict; and it is matter of evidence, whether a gun be an engine to kill and destroy game.

Supra p. 523.

Infra p. 577.

As to the third, the statute 9 *Ann.* saith not that he shall for every offence pay 5*l.* but shall forfeit the penalty of the statute 5 *Ann.* on higglers, and which is 5*l.* for every hare, &c.

And being a debt, the Jury may find part of the debt.

2 Ld. Raym.

814.

4 Burr. 2231. 2 Bl. Rep. 1221. Dougl. 6. 1 H. Bl. 249.

Judgment was given for the plaintiff.

Case 216.

Philips *vers*. Fowler. In C. B.

A verdict was
set aside where
the Jury cast
lots, how they
should give it.
Prac Reg. 409.

S. C. Barnes 441. S. C. Co. G. 124. S. C. Andr. 383. 1 Term Rep. 11. 1 Str. 642.

IT was moved for a new trial, because the Jury being divided cast lots, which falling in favour of the plaintiff, a verdict was given for him.

(a) 1 Freem.
414

If the Jury cast lots how they shall give their verdict, and give it as the lot determines, the verdict shall be set aside. Resolved 2 Lev. 139. (a) After a motion in arrest of judgment, on an information in nature of a *quo warranto*, for fishing in the river *Thames*, *The King* against *Ld. Fitzwalter*, (this was before *Hale* in the King's Bench) *Tr. 27 Car. 2.* a verdict was set aside for the same cause. 2 Lev. 205. In the case of *Foster and Hooden*, *M. 29 Car. 2.*

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(b) 3 Keb. 805.
S. C.

So in the case of (b) *Fry and Hordy*, 2 Jon. 83.

So a verdict was set aside, which the jury had agreed to give, if the Court should approve of it. *Cro. Eliz. 779.*

In the case of *Prior and Powers*, 1 Keb. 811. *Mich. 16 Car. 2.* it is said that a new trial was denied for this complaint, but it was because the matter appeared only by pumping the Juryman to swear against himself; and *Twissden* said that it would be of ill consequence; and that in *Sir Philip Alton's* case a new trial had been granted for throwing cross or pile.

Serjeant *Chapple*, *contra*, insisted, That it had been admitted by the motion in arrest of judgment, that the verdict was good; and therefore the defendant cannot have liberty afterwards to move to set it aside; in pleading, if the defendant omit to plead in due order, he loses the benefit of the former. *Co. Lit. 303. (1)*

(1) There is much obscurity in this passage; the words in Coke Littleton, which I suppose to be alluded to in the text, are the following. "Good matter must be pleaded in good form, in apt time, and in due order, or otherwise great advantages may be lost." *Co. Litt. 303. a.*

And

And a man cannot plead to a *Scire Facias* matter which avoids or abates the writ.

PHILIPS &
FOWLER:
Cowp. 728.

In the case of *The King* against *Lord Fitzwalter*, though it is said to be a motion in arrest of judgment, the motion was only for a new *Venire*, &c. 3 *Keb.* 465. 555.

It is said in 2 *Salk.* 647. that none shall move for a new trial after a motion in arrest of judgment.

And after a motion in arrest of judgment none shall move to set aside a writ of inquiry.

After a writ of error brought, you cannot move to set aside the judgment for irregularity. 1 *Salk.* 402.

Serjeant *Eyre* to the same effect.

In reply, Serjeant *Skinner*, *Hawkins* and *Wright* insisted, That this motion is not to set aside the verdict for an irregularity, or for being against evidence; but because it is against justice, against the nature of a trial by Jury, and against *Magna Charta*, which saith that trials shall be *per judicium parium suorum*.

[527]

It is admitted that the motion is not too late to punish the Jury; shall it then be too late to prevent the ruin of the defendant by this verdict, for which they are punished?

Judgment had been entered in case; and on discovery that it had been illegally obtained, it was vacated. (a) 1 *Lev.* 95. A verdict was holden to be void, because the Jury examined the witnesses apart. 2 *Roll. Abr.* 715. 1 *And.* 232. *Mo.* (b) 451.

(a) Raym. 73.
2 Sid. 125.
1 *Keb.* 478.
S. C.

(b) Cro. Eliz.
411. S. C.

Chief Justice; It is generally true, that after a motion in arrest of judgment, a matter known to the party, shall not be insisted on for the purpose of having a new trial.

But there is no instance where, in a case like this, the verdict was allowed, because there had been a motion before

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FOWLER.

in arrest of judgment; this therefore being a verdict contrary to *Magna Charta*, to the duty of a Jury, and against reason and right, I think there ought to be a new trial; the case 2 Lev. 139. *The King* against *Lord Fitzwalter*, is a resolution express in point.

Judge *Denton* and I were of the same opinion; Judge *Fortescue* doubted; he said, that he could not take it to be as no verdict since the *Poslea* had returned it as such, but he agreed that it ought to be a void verdict; and it was set aside. (2)

(2) Lord *Mansfield*, in the case of *Vase v. Delaval*, reported in 1 Term Rep. p. 11. declared, upon a motion for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and that the plaintiff's friends won, "that the court could not receive such an affidavit from any of the jurymen themselves, in all of whom such conduct was a very high misdemeanour. But in every

such case the court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some other such means." This determination appears to be contrary to the doctrine laid down in the case of *Parr v. Seames*, Barnes 438. in which similar affidavits of the jurors would have been accepted by the court, if they could have been procured.

[528] Castle an Attorney *vers.* Bailey. In C. B.
Case 217. Intr. Pasch. 8 Geo. 2.

Where a verdict hath found words spoken of the plaintiff as brother of the defendant, it is sufficient, tho' no averment in the declaration that he was his brother.

THIS was an action for words, for that the defendant on the 1st of May, 1734. falsely and maliciously spoke of the plaintiff, as follows, *He* (meaning the plaintiff) *is perjured and forsworn, and I can prove it.*

Secondly, *My brother* Castle (meaning the plaintiff) *is perjured and forsworn, and I will prove the same.*

Thirdly, *My brother* John (meaning the plaintiff) *is perjured and forsworn, and I can prove it; To the damage of the plaintiff of 5000l.*

The

The defendant pleads not guilty; a verdict was found for the plaintiff, and damages were given generally. CASTLE v.
BAILEY.

Serjeant *Chapple* moved in arrest of judgment because of intire damages having been given; and on the 2d and 3d counts the action is not maintainable because there is no averment that the defendant was brother to the plaintiff, and then no evidence that those words were spoken of the plaintiff.

And it hath been laid down as a rule, that where the words spoken may be applicable to several, it is not sufficient to say the words were spoken of the plaintiff; but there ought to be an express averment, that the plaintiff hath the title or description given him.

In the case of *Delamere v. Heskins*, 11 Car. in the King's Bench. 1 Rol. Ab. 84. 774. Cro. Car. 442. Error was of a judgment in the Court at Bath, wherein the plaintiff declared, that in a suit there between the defendant and S., the plaintiff was witness; and in a discourse of such trial with the wife of S. and of the oath which the plaintiff had taken, the defendant said of the plaintiff, *Your brother Delamere (Innuendo the plaintiff existet' fratrem dict' uxoris) took a false oath against me in the Hall, &c.*

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After a verdict for the plaintiff, the declaration was holden not to be good, because it did not aver that the plaintiff was brother to the wife of S.; indeed the report adds *quare rationem* — for there was another cause of the judgment, namely, because there was no averment that issue was joined, but only, that at a trial he was witness, and swore, &c.

So in *Mich.* 15 Car. in the King's Bench, in the case of *Johnson and Dy*, 1 Rol. 84. sec. 4. the plaintiff declares that the defendant having discourse of the plaintiff, said of him to *John Johnson, Sen.* *I will take my oath that your son stole my hens*; judgment was arrested because there was no averment that the plaintiff was his son; but *Mur.* 62. takes

Supra, p. 268.

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BAILEY.

notice that *Croke* was absent. *Vide* 2 *Cro.* 635. *Palm.* 283. S. C.

1 *Vin. Abr.*
529. pl. 9.
Supra p. 268.

So *H.* 1652. in the case of *Burrows* and *Usher*, 1 *Roll.* 85. *sec.* 9. the plaintiff declares that the defendant having discourse of the plaintiff, said of the plaintiff, *Your father* (Innuendo the plaintiff) *struck and killed* Nich. Russell.

But judgment was arrested after a verdict, because it was not averred that the plaintiff was father to him to whom the words were spoken.

Com. Dig. Tit.
Action upon the
case for defama-
tion, (G. 8.)
p. 197.
(a) *Goldf.* 187.
S. C.

So likewise it was adjudged by three Judges, (*Gawdy, contra*) in *Cro. El.* 416. (a) So by all the Judges in the case of *Phelps v. Lane*, *Cro. Car.* 92. So (1) 1 *Brownl.* 177. [The Court were divided in the case of *Spencer v. Medburne*. (b) *Cro. Car.* 420. 1 *Roll. Abr.* 84. pl. 1.]

(b) *W. Jones*
576. S. C.
Yelv. 21.
Cowp. 276.

Resolved, 4 *Co.* 17. *b.* that in actions of slander two things are requisite, namely, the person must be ascertained, and the slander must appear from the words themselves, and cannot be supplied by an *Innuendo*. An *Innuendo* will not ascertain the person of the plaintiff. *Hob.* 267. Words must be such as by-standers may understand them of the plaintiff. 1 *Roll. Abr.* 74. *Cro. Eliz.* 496. Where words are spoken in *Latin*, (2) there must be an averment that the by-standers understood the language, so if spoken in *Welsh*.

1 *Brownl.* 7.

Hob. 263.

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The denomination of brother is very extensive and uncertain; all relations by marriage, nay all in like office or employment, are often called brothers.

(1) The only case which I can discover in *Brownlow* bearing in the least upon the present, is that of *Jotham v. Bad.* 1 *Brownl.* 10: which is as follows. "Action upon the case for slanderous words, *Videlicet*, your master *Euseby*, meaning the plaintiff, is a rogue, a rascal, and forger of bonds; the plaintiff laid a *Coloquium* between the defendant and one *R. G.* and after verdict, moved in arrest of judgment,

for that it did not expressly appear, that the said *R. G.* at the time of speaking the words was servant to the plaintiff; and judgement was stayed by the court."

(2) And an averment that the hearers understood *Lingua Romanam*, is not sufficient where the words were *Latin*, for that also imports *Italian*. 1 *Roll. Abr.* 74. l. 30. *Cro. Eliz.* 496.

But where the words denote a person present or a person certain, there the declaration is sufficient, if it alledge the words to be spoken of the plaintiff without any other averment.

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BAILEY.

As in the case of *Woodroof and Vaughan, Cro. El. (a)* 429. *I did not know that Woodroof was thy brother, he hath forsworn himself, I will prove him perjured*; the declaration was holden good.

(a) Poph. 210.
Moore 365.
S. C.

So in the case of *Nelson v. Smith, Mich. 22 Car.* in the King's Bench, the defendant having discourse of the plaintiff, said of the plaintiff, *Captain Nelson is a thief, &c.* and holden good without an averment that the plaintiff was a Captain, or known by that name, for a plurality of *Nelsons* shall not be intended.

So in the case of *Brown v. Lane, 2 Cro. 443.* Where the words were as follow, *Thy master Brown hath robbed me*; resolved that the declaration was good, though there was no conversation of the plaintiff, or averment that he was his master, for it shall not be intended that he had more than one master. 1 *Roll. Abr. 79. S. C.*

So in 1 *Roll. Abr. 80.* the declaration was holden good, where the words were, *Go tell thy landlord he is a thief*, without an averment that the plaintiff was landlord to the person to whom the words were addressed. So the words, in the case of *Wifeman v. Wifeman, Thy brother*, meaning the plaintiff, *is perjured*, were holden good without any averment. 1 *Roll. Abr. 80. l. 25. Cro. Jac. 107.* So in the case of *Terry v. Hooper, (b) Raym. 86.*

(b) 1 Lev. 115.
1 Keb. 602.
644. S. C.

Chief Justice: The verdict hath found the words spoken of the plaintiff, otherwise the plaintiff could not have had a verdict; the cases 2 *Cro. 443. Brown and Lane*, and 2 *Cro. 107. Wifeman and Wifeman*, seem in point.

If there had been no allegation that the words were spoken of the plaintiff, the *Innuendo* would not have helped it; words are not so strictly construed as heretofore, and

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2 Raym. 960.
Skinn. 183.
Show. P. C. 15.

there is good reason for it, since discouragement of actions for slander will encourage revenge in another manner.

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A libel is sufficient, when alledged to be of and concerning the King and government, the ministers, &c. the other is matter of evidence, whether the words concerned them or not.

The other Judges concurred in the same opinion; and judgment was given for the plaintiff.

CASE 218. Joshua Hands *versus* Herbert James. In C. B.

It shall be left to a Jury to determine, merely from circumstances without any positive proof, whether the witnesses to a will (being all dead) set their names in the presence of the testator.
2 Eq. Abr. 764.
pl. 16, S. C.

THIS was an action of ejectment on the demise of ——— *Hutchinson*, on the 1st of *October*, 8 Geo. 2. At a trial at the sittings, on the 17th of *February*, 8 Geo. 2. before Chief Justice *Eyre*, the plaintiff's lessor made title to the premises as heir at law to *William Hutchinson*; the defendant on evidence shewed, that *William Hutchinson* and *Hannah* his wife were joint purchasers in fee; *Hannah* survived, and by will, dated the 28th of *April*, 1719. devised to the defendant; at the execution of the will, the words subscribed are *signed, sealed, published and declared by the testatrix as her last will and testament, in presence of us*; and then three witnesses set their names; but those witnesses being all dead, there was no proof that the witnesses set their names in the presence of the testatrix, but one witness was an attorney of good character; and it was left to the Jury, who found a verdict for the defendant.

But it was agreed by consent that a case should be made and left to the opinion of the Court, Whether this matter should have been left to the jury to determine, Whether the witnesses set their names in the presence of the testatrix?

Serjeant *Eyre* for the plaintiff. This was a necessary circumstance by the statute of frauds (a) to be proved; it is expressly

(a) St. 29 Car.
2. c. 3. § 5.

precisely required, that the witnesses should set their names in the presence of the testatrix.

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JAMES.

And it appears by the case, that it was not proved, for all the witnesses, that could have proved it if it was done, were dead, and therefore it ought not to have been left to the Jury, who could no more tell it was, than that it was not so.

Serjeant *Chapple contra* : The query is not, whether the witnesses should subscribe in the presence of the deviser, but whether the evidence of this should not be left to the consideration of the Jury? If the Jury cannot have express proof, they may determine on circumstances; as in the case of livery on a feoffment when it is not indorsed, or the execution of a deed that is inrolled but not proved, or a deed proved by the counterpart when the original is lost.

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Per Cur' : This is a matter fit to be left to the Jury, which is all that is referred to the Court. The witnesses by the statute of frauds ought to set their names as witnesses in the presence of the testatrix, but it is not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved; if inserted, it does not conclude but it may be proved *contra*, and the verdict may find *contra*; then if not conclusive when inserted, the omission does not conclude it was not so, and therefore must be proved by the best proof which the nature of the thing will admit.

In case the witnesses be dead, there cannot probably be any express proof, since at the execution of wills few are present but the deviser and witnesses; then, as in other cases, the proof must be circumstantial, and here are circumstances.

1. Three witnesses have set their names, and it must be intended that they did it regularly.

H 4

2. One

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JAMES.

2. One witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary.

And there may be circumstances to induce a jury to believe that the witnesses set their hands in the presence of the testatrix rather than the contrary; and it being a matter of fact, was proper to be left to them; as, Whether livery was given on a feoffment, when no livery is indorsed; whether a deed was executed, when only a counterpart was produced, &c. And the Court was of opinion that the plaintiff ought to be nonsuited. (1)

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(1) The same question came before the Court in the case of *Croft v. Pawlet*, reported in 2 Str. 1109. and it was decided upon the authority of the present case, that a compliance with all

the circumstances enjoined by the statute of frauds was a matter of fact proper to be left to the determination of a jury.

Cafe 219. Newberry and his Wife *vers.* Stradwick.
In C. B.

It is sufficient to insert in the copy of the issue, by way of replication to a plea of *Nul tal. record.* *Quod habetur tale recordum*, though not under counsel's hand. Barnes, 335. Prac. Reg. 228. S. C.

THIS was an action of debt in this Court on a judgment in the King's Bench.

The defendant pleads, No such record.

The plaintiff replies, *Habetur tale record.* and a day given to bring it in.

Upon this the defendant made up the issue, and delivered a copy of the issue with the replication, which was accepted by the plaintiff, and paid for, and the record not being brought in, the defendant signed a *non pros.*

It was now moved by Serjeant *Belfeld*, that when no such record is pleaded, where the record lies in the same Court, upon

upon which it is prayed *quod per cur. videat. &c.* the issue may be made and delivered, and it is well. HANDS W.
JAMES.

But when the record is in another Court, there ought to be a special replication delivered, *quod habetur tale recordum*, under counsel's hand; and it is not sufficient to insert it in the copy of the issue delivered, for thereby the King will be defrauded of the stamps.

And it was agreed, that there ought to be a replication *Quod habetur tale recordum*.

But it was certified by the prothonotaries, that of late it hath been holden sufficient to insert such replication in the copy of the issue delivered, and that being on stamped paper, it is the same thing in respect to the duty as if delivered in a paper by itself. And Prothonotary *Borrett* said that this had been several times done and allowed. [534]

And Prothonotary *Thompson* said, that the plaintiff having accepted the copy of the issue, and paid for it, it was too late for him to complain of it (1); for if he had not acquiesced in it, though he could not refuse to pay for the copy of the issue, yet he should have struck out that part.

And Sir *George Cook*, Prothonotary, shewed a cause, where after paying for the issue, it was holden too late to complain.

And the Court was of that opinion (2).

(1) In the case of *Sedgwick v. Richardson* there was "a motion to set aside a judgment, because the plaintiff had not delivered a replication in form, and given a rule to rejoin; but it appearing that the defendant's attorney had agreed to take the issue as delivered, the Court held that he thereby

waved the form of a replication and rule, and therefore they discharged the rule which had been granted to shew cause." *Co. G.* 46.

(2) The case of *Fox v. Lewing*, reported in *Co. G.* 56. received a similar determination from the Court with the present.

Case 220.

Moxon *vers.* Horfenail, & *al.*

Whether chambers in an Inn of Chancery are within the words or intent of the stat. 43 *Eliz.* c. 2. rateable to the poor.

THIS was an action of trespass for entering the plaintiff's chamber at *Bernard's Inn*, *London*, and taking his chair, value 50 s.

On Not Guilty pleaded, the jury find a special verdict to this effect :

That the parish of *St. Andrew, Holborn*, lies part in *London* and part in *Middlesex*; that Sir *Francis Child*, Alderman of *London*, on the 6th of *May* 1732. appointed overseers for that part within *London*, and two Justices of Peace nominated overseers for that part in *Middlesex*, and the churchwardens and overseers rated the parish to the poor, which was approved, &c. and thereby the plaintiff was rated 1 s. That the plaintiff inhabited a chamber in *Bernard's Inn*, being an Attorney of the King's Bench, and a Member of that Society, and having that chamber for the exercise of his profession, and having no other habitation; that *Bernard's Inn* lies in that part of the parish which is within *London*; that the defendants by virtue of a warrant from Sir *Francis Child*, then Alderman, on the 11th of *July* 1733. on the plaintiff's refusal to pay the rate, distrained the said chair, being of 2 s. value, as overseers of the poor; and afterwards it was appraised, and sold for 2 s. and they returned the 1 s. overplus; that there are other chambers in *Bernard's Inn*, the occupiers of which were also rated; that *Bernard's Inn* is one of the Inns of Chancery used and inhabited by students and practisers of the law time out of mind, and dependant on *Grey's Inn*, as an Inn of Court for the study and practice of the law. And if the plaintiff on this matter be a person liable to be assessed to the said tax, they find for the defendant, if not, for the plaintiff.

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Serjeant *Wright* for the plaintiff argued, that he is not liable to be rated to the poor for his chamber in this case; for if it be within the statute 43 *El.* c. 2. it must be as an inhabitant

bitant of the parish, or as an occupier of a house within the parish.

Moxon v.
Horsenaile.

By that statute, the churchwardens and overseers may raise a stock for the relief or employment of the poor by taxation of every inhabitant, parson, vicar, others, &c. and of every occupier of lands, houses, &c. in the said parish, in such competent sum as they shall think fit.

The word *Inhabitant* in its largest sense comprehends every person that dwells in a place; but that could not be the meaning of the word in this act, for then all women, servants, children, &c. in a parish might be rated, which never was done.

But it may be taken in a more strict sense; as where the stat. 22 Hen. 8. c. 5. for repairing bridges, enables Justices of the Peace to tax every inhabitant, Lord Coke saith, in 2 *Inst.* 703. the act extends not to every person that hath personal residence, as servants, &c. but to such as are householders; and this appears by the fourth branch of the statute, which gives distress on every such inhabitant in his lands, goods, chattels, &c. Infra. p. 692.

And it has been always holden, that by the stat. 43 Eliz. c. 2. the inhabitant is rateable in respect of his land or ability; so it was resolved 5 Co. 67. b.; and so by the Chief Justice Eyre in this Court. *Tr.* 5 Geo. 2. it was agreed. *Fitzgib.* 298.

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But the plaintiff is to be considered as a guest occasionally residing in his chamber for the study and practice of the law, as an agent indeed for his clients in several parts of the kingdom. And by the order of all the Judges of *England*, *Mich.* 3 *Ann.* the attornies are ordered to be admitted, and take chambers in some Inn of *Chancery*, or in lodgings near, &c. so that lodgings and chambers are looked upon as places of the same nature. A person that comes to the term may be a lodger, *Latch* 127. and a person at a chamber in the *Temple* may

MOTON v.
HORSENAIL.

may take an examination in relation to a robbery as a Justice of the Peace dwelling in or near the hundred, which is in a distant county; which shews that he was not looked on as an inhabitant at his chamber. *Cro. Car.* 212.

Secondly, The plaintiff cannot be charged as the occupier of an house, for it is found that there are many chambers in the house, and that he hath but one. By the case in *2 Salk.* 532. it seems as if the house rateable to the poor ought to be one intire house; though if several houses be joined into one, and several families live in it, or if one house be divided into two for several families, they may be rated severally. This is *Hospitium*; and *Domus & Hospitium* differ (*Hob.* 245.) A man is not chargeable for a standing in the market. *2 Rol. Abr.* 289. *2 Rol. Rep.* 238. All persons in Colleges and Inns of Court may equally be charged.

Serjeant *Hawkins contra*: The words of the statute 43 *El. c. 2.* are exprefs, That a rate shall be raised by taxation of every inhabitant; and there can be no prescription against an act of parliament, therefore there is no force in the argument, that chambers have not heretofore been rated.

Cowp. 8.

A chamber is *Domus Mansionalis*, and burglary may be committed by breaking and entering into it with intent to commit a felony. Resolved *Cro. Car.* 474. *1 Hale's P. C. p.* 527. 556. *2 Hale's P. C. p.* 358.

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It is objected, that the plaintiff is there as a guest; but it is found that he inhabits there, and hath no other habitation; so that unless rated here he can be rated no where. It is charity to the poor, which by the law of God and man every one ought to pay.

And an Attorney hath no privilege to be exempt, although he hath privilege to excuse himself from an office that inter-
feres

feres with his attendance at *Westminster*, as to be a foldier. MOXON v.
HORSENAIL.
1 *Vent.* 16. to be a reeve, &c. *March* 30. (1)

Although by *Magna Charta* it is enacted, that *ecclesia sit libera*, yet a parson, &c. is subject to all charges by act of parliament, 2 *Lev.* 139. much more therefore an attorney; nor can any order of Court exempt them.

In reply it was admitted, that an attorney could not claim any exemption in respect of his profession, &c. But the sole question was, Whether chambers in an Inn of Chancery are within the words or intent of the stat. 43 *Eliz. c. 2.* rateable to the poor's rate? If they be so, no prescription, no orders of Court can exempt them. But that they have been charged no instance can be given; and it will be equally the case of all scholars, fellows or students in the University or Inns of Court.

Ideo adjournatur. (2)

(1) An attorney is also exempt from being a constable. *Prou's* case, Cro. Car. 389. In the case referred to in *March*, it was agreed by the whole Court, "That for all offices which required an attorney's personal and continual attendance, as churchwarden, constable, and the like, he should have his privilege; but for offices which might be executed by deputy, and did not require attendance, such as recorder, and the like, that for them he should not have his privilege."

(2) I have made much enquiry re-

specting the subject of the present case, and find that the antient Inns of Court and Chancery are exempt from poor's rates, not upon the ground of their being Inns of Court, but on account of the Sites of them being extraparochial. If however any enlargement is made, as has been the case in Lincoln's Inn, and the foundation upon which that enlargement is built is not extraparochial, the inhabitants of chambers thus situated are rateable to the poor's rates, within the intent of the statute. 43 *Eliz. c. 2.*

Case 221.

Noxon *vers.* Lilly, & *al.* In C. B.

A process to
take the body in
the first instance,
if found; if not,
to attach him by his goods, is a void process, and custom will not make it good.

THIS was an action of trespass for taking the plaintiff's goods.

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The defendants justify by process out of the Court of Record at *Worcester*, and alledge, that a plaint was levied by the defendant against ———, and that there is a custom, that on such plaint an attachment shall issue to take the defendant, if found in the jurisdiction; if not found, to attach him by his goods to appear, &c. That on such plaint by the defendant *Lilly* against the said ———, an attachment issued, directed to the other defendants, to attach the plaintiff by his body or goods, which precept the defendant *Lilly* delivered to the other defendants, who were serjeants at mace, who took the goods in the declaration.

The plaintiff demurs.

Serjeant *Chapple*: This process is not good, it is a contradiction in itself, for it is to take the body if found; if not found, to attach him by his goods. When shall he do so, or when shall he be said not to do so?

He hath till the return of the precept to take the body, and before ought not to take the goods. In case an act of parliament direct the levying a penalty by distress and sale, and if no distress, he shall be committed, there must be a new warrant for commitment after it appears that there is no distress.

Secondly, The process issued pursues not what the custom alledges that the process ought to be; for it is to attach the defendant by his body or goods, &c. without saying if the defendant is not found; so it leaves it to the discretion of the officer to take the body or goods at his election.

Thirdly,

Thirdly, The taking so many goods as in the declaration is extraordinary. NORON v.
LILLY.

Serjeant *Hawkins* : In case there be a mistake or error in the process, that shall not prejudice the parties to the suit nor the officer; and here, the process is not by grant but by custom.

Cur. There is no difference between process by grant and custom, for if the King grants the privilege *tenere placita*, legal and usual process the grantee may issue as incident, and custom supposes a grant originally, but in both cases it must be a process legal; none can justify the restraint of another's liberty, or taking away his property, unless by the law of the land, that is he must have a lawful authority, and must duly pursue it.

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Here the process is to take the body of the defendant in the first instance, if he be found, &c. which is a void process, and custom will not make it good.

Brice *vers.* Smith. In C. B.

Case 222.

TO an action of *Formedon*, the defendant pleads *Ne done* *per*; on the trial a will was produced dated the 28th of July, made by *Philip Brice*, grandfather of the demandant, whereby he devises the premises to his son *Philip* (the father of the demandant) and his heirs, on condition that he pay 30*l.* to his brother *William*, &c. then devises copyhold lands to his other sons in like manner; and in case any of my children die without issue, then I give the estate of him or them so dying, to the right heirs of them or him so dying for ever; no subscription was signed, sealed and published, &c. but only the names of witnesses subscribed.

If an estate be given to a man and his heirs, and if he die without issue remainder over, those words are explanatory of the word *heirs*, and make an estate-tail. (1) 2 Eq. Abr. 317. pl. 32. S.C. 1 Str 428. 3 Term Rep. 145.

(1) Vide supra, p. 82. the case of point is fully discussed. *Nuttingham v. Jennings*, where this

BRICE v.
SMITH.

A verdict was found for the plaintiff.

Serjeant *Wright* insisted, that this was an estate-tail in his son *Philip*.

(a) Poph. 131;
S. C.

In the case of *Dutton v. Engram*, in *Cro. Jac.* 427 (a). a devise to his eldest son and his heirs, on condition, &c. and if he die without heirs of his body, then to his other son and his heirs; and held an estate-tail in the eldest son.

(b) 2 Roll. Rep.
281. S. C.

So in the case of *Gilbert v. Witty*, in 2 *Cro.* 655. (b) there was a devise to his son and heirs, and if he die without issue, to his wife *Margery*, &c.

(c) Noy 64.
S. C.

So 1 *Lutw.* 810, 813. *Cro. Eliz.* 525 (c). *Mo.* 422. S. C. *Ray.* 425.

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Serjeant *Eyre*, *contra*: The first question left to the Court is, Whether there is sufficient proof of the will?

Supra, p. 531.

But it was answered, This is a fact left to the jury.

2dly. This is an estate in fee, for the devise is to *Philip* and his heirs expressly, and no limitation, if he die without issue, to any other persons, as in the cases cited, but to the right heirs of the devisee himself. Devise to three daughters and heirs, and if either die without issue, then to *J. S.*; the three daughters have an estate-tail and not a fee, for the limitation of the remainder over explains what heir he means, which imports, if no remainder over, the estate would be a fee. 1 *Roll. Abr.* 836. pl. 7.

So in 2 *Leon.* 68. and 3 *Leon.* 115. *I give my lands in A. to my son John, in B. to my son Stephen, in C. to my son Roger, and if any live to full age and have issue, to them and their heirs in like manner; but if any die without issue of his body, devises over.* By 2 *Inst.* they have a fee, and so at last it was resolved by the whole Court.

The Chief Justice seemed of opinion for the demandant, for the words (*if he die without issue*) are explanatory of the word (*heirs*),

(*heirs*) in the first part of the will, and shew that in the first words the testator meant to give to his son *Philip* and his heirs, (that is such heirs as were the issue of his body) and afterwards to his right heirs generally.

Baier v.
Smith.

If lands be given by deed to a man and his heirs, being understood to him and the heirs of his body, that makes an estate-tail.

Co. Litt. 27. a.
Supra, p. 83. is
note.

But it was said that the tenant in this case was a purchaser, and therefore a further argument desired, which was granted, and therefore adjourned.

And afterwards *Pasch. 10 Geo. 2.* judgment was given for the demandant by the whole Court.

Infra, p. 545.

Cornish *vers.* Trefey & *al.* In C. B. Intr. Hil.
9 Geo. II. Rot. 1886.

[541]
Case 223.

THIS was an action of trespass against three defendants, *William Trefey, Charles Lamb, Edward* otherwife *Edmund*.

Misnomer is improper for a demurrer, but ought to be pleaded in abatement.

The two first defendants pleaded Not Guilty, and the said *Edward*, who was attacked by the name of *Edmund*, makes defence and demurs.

And by Serjeant *Belfield* it was argued, that a man could not have two christian names, and therefore the defendant sued by the name of *Edward* alias *Edmund*, could not be so sued. 2 *Cro.* 558.

Infra, p. 574.

But it was answered by Serjeant *Wright*, and agreed by the Court, that this matter is improper for a demurrer, and that the defendant should have pleaded it in abatement, and then the plaintiff might have replied, and the plaintiff might have known against whom to have a new action.

And in pleas of abatement, the defendant must always give the plaintiff a better writ; besides the Court cannot judicially

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TREVELY.

take notice that the defendant's name is not as he is named in the declaration.

As a man may have several names added together at his baptism, as *Edward, Edmund, Edgar*, which all make but one christian name; so it is not impossible but he might be christened *Edward* alias *Edmund*; and the defendant admits himself to be the same person, by saying *and the said Edward*.
1 *Lutw.* 10.

2 Show. 394.

So judgment was given for the plaintiff. (1)

(1) A misnomer must be pleaded in proper person, and not by attorney.
1 *Lutw.* 11.

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Case 224.

Scrape *ver.* Rhodes & *al.* In C. B.

A devise to E.
H. and her heirs,
and if she and
D. S. die with-

out issue, the deviser gives several annuities charged upon the premises to charitable uses; held that E. H. had an estate in fee. 2 *Eq. Abr.* 902. pl. 20. S. C.

THIS was an action of ejectment on the demise of *J. Surby*. On Not Guilty pleaded, the jury find,

That *Nathaniel Hudson* was seised in fee of a moiety of 150 messuages, and also of seven messuages in or near *Saffron Hill* in *St. Andrew's, Holborn*; and by will dated the 3d of *November* 1699, devised the seven messuages to his sister *Elizabeth Hudson* and the heirs of her body, and for want of such issue to *Dorset Surby*, son of his sister *Martha* and his heirs and assigns; and his moiety, &c. of all messuages, &c. he devised to his said sister *Elizabeth* and her heirs; and in case his said sister and *Dorset Surby* both depart this life, having no issue of their or either of their bodies, he gives several legacies to charitable uses payable for ever; remainder to such uses as his sister *Elizabeth* shall appoint, which payments to charitable uses he directed should be paid after such decease of *Elizabeth* and *Dorset Surby*, without issue, by such persons as should enjoy the said moieties and estates; and as to the other moiety, he gave the same to his sister *Martha's* son *Dorset*, &c.

By

By lease and release dated the 6th and 7th of September 1705, *Elizabeth* conveys the premises to her devised, to the use of herself for life ; then as to one moiety to *Sarah* for life, then to trustees, &c. then to her first and other sons in tail, then to her daughters, &c. then to such uses as *Elizabeth* shall direct ; as to the other moiety, to the use of the said *Dorset Surby* for life, &c.

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RHODES and
Others.

Elizabeth dies without issue ; *Sarah* dies leaving issue *Anne* and *Elizabeth Bealings* ; *Dorset Surby* has issue two sons, *Hudson* and *John Dorset*, and *Hudson* dies without issue, *John* enters and makes the demise to the plaintiff.

Serjeant *Skinner*. The case is shortly this : *Nath. Hudson* seized in fee, by will devised to his sister *Elizabeth* in fee the moiety of 150 messuages, and to *Dorset Surby* seven other messuages, on failure of issue of the body of his sister *Elizabeth* ; and in case both the said *Elizabeth* and *Dorset Surby* depart this life, leaving no issue of their or either of their bodies, then he devises out of his said moieties and estates in *Saffron Hill* and *Chick Lane* for the maintenance of poor children in *Christ's Hospital* 10*l.* a year for ever ; and for the relief of the poor in the freedom of *London* in *St. Sepulchre's* parish 10*l.* a year for ever ; and 20*l.* a year to *Hannah Blake*, the daughter of his kinsman *James Linwood* of *Colchester* ; which three sums he directed should be paid yearly, after the decease of his sister *Elizabeth* and kinsman *Dorset Surby* without issue, for ever, on the 5th of *November*, by such person as should enjoy the said houses, &c.

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Elizabeth died without issue in 1709. *Dorset Surby* survives and enters, and dies, leaving *John Surby* the lessor of the plaintiff, (his eldest son *Hudson Surby* dying without issue in his life-time) and two daughters, *Sarah* and *Elizabeth*, of whom *Sarah* married *Richard Bealing*, by whom she left issue *Anne Elizabeth Bealing*, now living. The question is, whether the seven messuages, and the moiety of the other messuages of the testator, (which are the premises in the declaration) belong to the lessor of the plaintiff ?

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I apprehend it cannot be disputed, as to the seven messuages, but that an estate-tail did vest in *Elizabeth Hudson*, with remainder to *Dorset Surby* in fee; for the devise of them is expressly to *Elizabeth* and the heirs of her body, remainder to *Dorset Surby* and his heirs; and the lessor is his heir, so that as to them there can be no question.

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As to the moiety of the other messuages devised to his sister *Elizabeth* and her heirs, I beg leave to insist, that she had only an estate-tail in them, and then her conveyance by lease and release, dated the 6th and 7th of *September 1705.* will be void; for the subsequent words in the will, *In case the said Elizabeth and Dorset Sturby both depart this life, leaving no issue of their bodies, or either of their bodies, then such charitable legacies shall be paid for ever,* shew the testator's intent, that *Elizabeth* should have the moiety of the houses devised only to her and the heirs of her body.

In *Claché's case*, *Dy. 330. b. 1 Rol. Abr. 835. L. 35.* it was holden, That if a man devise land to *A.* his daughter and her heirs, and if she die without issue, it shall remain to *B.* and his heirs, and if both die without issue, then over to another; this is an estate-tail, though the devise was to *A.* and her heirs, which makes a fee.

So if a man devise to his son *Richard* and his heirs for ever, and if he die within the age of twenty-one, or without issue, it shall be divided among his other sons; it shall be an estate-tail. *Cro. Eliz. 525.* So *Webb and Herring, Cro. Jac. 416.* and *King and Rumbal, Cro. Jac. 448 (a).* *Nottingham and Jennings (b), 1 Salk. 233.* So in the case of *Craven and Sandford, H. 1726.* A man devise to his two daughters and their heirs for ever, and if all my said children die without issue, then he devise over to another; it was holden an estate-tail.

(a) 1 Rol. Abr.
836. pl. 7.
Supra p. 540.
(b) Supra p. 82.

On the other side it was insisted for the defendant, that the devise to *Elizabeth* in this case was to her and her heirs, and no devise of the lands over on her dying without issue, but
only

only a devise of three legacies, which were to stand charged on the estate in case *Elizabeth* and *Dorset Surby* both died leaving no issue; a contingency which hath not yet happened.

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Others.

Afterwards *Pasch. 10 Geo. 2.* this case was again argued by Mr. Serjeant *Chapple* for the plaintiff, who urged, that *Elizabeth* had only an estate-tail in the moiety of the messuages no more than in the seven messuages; and although the moiety of that moiety be only in question, yet to collect the intent of the will the whole will must be considered.

Where there is a devise to one and his heirs, and to another and his heirs in other part of the will, they are joint-tenants. So a devise to one and his heirs, and afterwards a devise over on his dying without issue, shews what heirs were meant in the first part of the will; and so it shall be an estate-tail.

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Supra p. 540a

Now here the devise of the seven messuages is to *Elizabeth* and the heirs of her body, and then to *Dorset* and his heirs; and the devise of the moiety to *Elizabeth* and her heirs gives but an estate-tail to both; for he afterwards charges legacies to charitable uses on both estates, and they are given, if *Elizabeth* and *Dorset* both die without issue. That they are charged on both appears, because they are to be paid by those who enjoy the said houses, grounds, moieties and estates, which words comprehend both the aforementioned estates, as well the seven messuages as the moiety of the 150 messuages.

Then he devises the remainder (that must mean the remainder of both estates) to such persons as *Elizabeth* shall appoint; so that here is a remainder limited to her in fee; and those words must signify nothing if the former devises did not make an estate-tail; and so are the cases, *Mo. 127. Ray. 452. 2 Jon. (a) 172. S. C. Ow. 29. 2 Cro. 416. 1 Rol. 836. 9 Co. 127. b.*

(a) Skinn. 17.
Poll. 425.
2 Show. 136.
S. C.

Serjeant *Eyre contra*: The charge of the legacies can be only on the moiety of the 150 messuages, and then the prin-

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cial argument, why the last words make an estate-tail, is taken away.

But it is plain that the devise of the seven houses is given to *Elizabeth* in tail, remainder to *Dorset Surby* in fee, and then this charge of the charitable uses is only to take place in case *Elizabeth* and *Dorset* both die without issue.

As to the cases cited, they seem applicable where cross remainders are limited, but cross remainders take no place but where there is a necessity for it,

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And afterwards *Trin. 11 Geo. 2.* the Chief Justice delivered the judgment of the whole Court for the defendant.

For in the former part of the will he expressly devises the seven messuages on *Saffron Hill* to his sister *Elizabeth* and the heirs of her body, and afterwards to *Dorset Surby*, the son of his sister *Mary*, and his heirs; and presently after the testator devises the moieties of other seventeen messuages to his sister *Elizabeth* and her heirs; whereby it plainly appears that the testator well understood the difference of limiting an estate in tail or in fee; and therefore he could never intend that *Elizabeth* should have no other estate in the moieties of the seventeen messuages which are devised to her and her heirs, than she had by the devise of the seven messuages given to her and the heirs of her body.

It is clear, if a man in the former part of his will gives lands to another and his heirs, and afterwards by subsequent clauses shews, that if the devisee dies without issue, it should go to another; and that is all that can be inferred from any of the authorities cited in the argument of this case, which are all agreed, and need not now be repeated.

But here the subsequent clause relied on, to prove this an estate-tail in his sister *Elizabeth* in the moieties of the seventeen messuages, is this;

But in case my sister Elizabeth and my nephew Dorset Surby die, leaving no issue of their or either of their bodies, he gives out of his houses and the said moieties three annuities, payable by them who should enjoy the estate after the decease of his sister Elizabeth and Dorset Surby without issue.

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So that he does not devise the lands themselves, but only yearly sums of money payable out of the lands.

The intention therefore seems to be, as far as can be collected out of such obscure words, that his sister *Elizabeth* should have the estate in fee; but if she left no issue, and if his nephew *Dorset Surby* left no issue, (who was heir at law to *Elizabeth*, if she left no issue) then the estate should stand charged with those annuities in the hands of any collateral heir.

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Judgment was given for the defendant.

Athelston vers. Moon and Willis. In C. B.

Case 225.

ON a motion for an attachment, for not performing an award which had been made pursuant to a rule of Court, it was objected by Mr. Serjeant *Eyre*, that the award was void; for the submission is of all matters between the parties, (without saying between them or either of them) so as the award be made of the premises by such a day. But the award is, that the defendant *Willis* should pay a sum of money due by him to the plaintiff; as therefore the submission must be understood of joint demands which the plaintiff had against the defendants, this award of a several debt from one of them only is not within the submission.

A submission of all matters in difference, imports all matters which either party had jointly or severally against each other.
1 Com. Dig. 321.

But it was not allowed; for a submission of several persons of all matters in difference between them imports a submission of all matters that either had against the other jointly or severally; and so it was holden, 1 *Rel.* 246. *pl.* 5.

ATHELSTON

v. MOON.

(a) Cro. Jac.

285. S. C.

2 Brownl. 309. S. C. 1 Bulst. 144. S. C. Lutw. 1628. Supra p. 329.

8 Co. 98. (a) *Basspole's* case; and the words *Ita quod, &c.* do not in this case any wise restrain the arbitrators.

Case 226,

King *vers.* Harris. In C. B.

An attachment returnable before the full term, if

after the Effoin-day, which is strictly the first day of the term, was holden good. Co. G. 112. Barnes 31. Prac. Reg. 437. S. C.

AN attachment which issued for a contempt was made returnable on *Wednesday* next after —

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And by Serjeant *Chapple* it was moved to quash it; for although the Effoin-day was the day before, the term did not begin till the *Friday*, which being the day of appearance, the process ought not to have been returnable before, and consequently it is void, and ought to be set aside as a writ returnable at a day out of term.

Serjeant *Wright*: This is not returnable at a day out of term, for the Effoin-day is the first day of term.

And in 1 *Bulst.* 35. it was holden, that a judgment might be given on the Effoin-day, and that when given in full term it relates to the Effoin-day; that a judgment upon an inspection of an infant made on the Effoin-day was good, for the parties may appear on the Effoin-day, although the *Quarto die post* is the day of grace allowed them, before which no default shall be recorded.

But if the defendant do appear on the Effoin-day, his appearance may be recorded, and he may then plead, and judgment may be then given.

And Justice *Williams* said, that here a difference appeared between the *Teste* and return of writs; for a return may be on the Effoin-day, though a writ shall not abate if returned on the *Quarto die post*.

And *Croke* said, if a man be bound to appear on the first day of term, he may appear on the Effoin-day.

So

So it was resolved, That judgment by confession, *H. 22 Jac.* relates to the *Essoin*, and so precedes a recognizance acknowledged *22 Jan.* the day before full term. *Cre. Car. (a) 102. (1)*

KING v.
HARRIS.

(d) *Hott. 72.*
S. C.

(1) The writ in this case was ordered to be quashed. *Prac. Reg. 437. Barnes 31.*

Craven *vers.* Hanley. (1) In C. B.

Case 227.

THIS was an action of trespass for entering the plaintiff's close, and eating his hay with defendant's cattle.

Where the trespass is confessed by the defendant in his plea, the plaintiff shall have judgment.

though a verdict be found for the defendant. *Prac. Reg. 240. Barnes 255. Co. G. 143. S. C. Barnes 266. 2 Str. 873. 2 T. Rep. 758. Hob. 56.*

The defendant pleads, that the plaintiff was possessed of a close called *Little Holme* in the said village, and that the plaintiff on the 14th of *October*, gave licence to the defendant to eat up the fog off the close in the said village with his cattle, at any time between that day and the 11th of *November* following; and that he put in the cattle in the declaration to feed the fog in the said close, and the plaintiff having an hay-stack in the close, for want of fencing about the said hay-stack his cattle eat the said hay, *viz.* six load of hay, part of the said hay-stack, *absque hoc*, That he was guilty at any other time than between the said 14th of *October*, and the 11th of *November* following.

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(1) In this cause the Court took time to consider whether the plaintiff should have leave to sign judgment, the verdict being found for the defendant, upon the ground of the plea confessing the trespass. And, pending the consideration of the Court, the defendant died; and afterwards the plaintiff obtained a rule for defendant's executor to shew cause why he should not enter judgment *nunc pro tunc*, which rule was made absolute, the Chief Justice declaring that if the party be entitled to his judgment, and only delayed by the doubting of the Court, it would be very hard that he should suffer. *Prac. Reg. 242. Barnes 255. Co. G. 143.*

CRAVEN v.
HANLEY.

The plaintiff replies *of his own wrong, &c.*

And after a verdict for the defendant, Serjeant *Eyre* moves, that the plaintiff ought to have judgment; that this licence is no justification of eating the plaintiff's hay, and consequently that the trespass being confessed, the plaintiff ought to have judgment.

Serjeant *Chapple* for the defendant insisted, that this issue being found for the defendant, judgment ought not to be for the plaintiff.

It appears that the plaintiff put a fence about his hay-cock, but it was insufficient; though the licence is to be taken strictly, yet the person licensed is excusable if his cattle against his will do eat the grass where way, &c. is, to which licence is given.

(a) Godb. 282.
2 Roll. Rep.
142, 152.
Falsp. 71. S. C.

In the case of *Plummer and Webb*, (a) *Popham* 151. (2) *Noy* 98. S. C. *A.* licenses *B.* to put a stack of hay on his land, afterwards *A.* leases his land to *W.* whose cattle eat the hay; no action of trespass lies; this case was cited in *1 Vent.* 44. and allowed, for *B.* ought to fence his hay at his peril. *1 Jon.* 388.

Serjeant *Eyre contra*: The trespass being confessed, the plaintiff ought to have judgment, though the verdict be found for the defendant, if the matter of the plea do not excuse the defendant in eating the hay with his cattle.

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Now where licence is given, the party can only do what he is licensed to do. It is said, the cattle going in a way to which he is intitled are excused in eating the grass, that is, eating what cannot be helped; he must say *raptim & sparsim*.

In the case of *Poph.* 151. the hay belonged to him who had licence to put his hay on the land, and then no doubt he ought to take care of it himself.

(2) This case in *Popham*, and the by the name of *Webb v. Pater-*
Books quoted in the margin is called *nofter*.

But here the hay belongs to the owner of the land, and the licence is to eat the fog off his ground, but not to eat out his hay.

CRAYN v.
HANLEY.

And afterwards the Court was of that opinion; for the defendant ought to secure the hay at his peril, and he might justify the doing so, as it seems by the cases mentioned. *Poph. 151. Noy 98.* which are cited in 1 *Vent. 44.*

Judgment was given for the plaintiff, who may afterwards have a writ of inquiry. (3)

Carth. 372.
2 Str. 373.

(3) As the plaintiff in this case was to blame in joining an immaterial issue, and thereby delayed himself, he would not be entitled to costs. In *Kirk v. Newill* 1 Term Rep. 266. Where the plaintiff had replied to a plea of the defendant which was insufficient in point of law, the Court refused costs, upon the ground of the plaintiff having contributed to the costs as well as the defendant. And *Buller* Justice added, "He should have demurred to the defendant's plea; and by going on to trial he is equally in fault." The same point was determined in the case of *Noble v. Lancaster*. Barnes 125.

Term. San&t. Trin.

9 & 10 Geo. II. In C. B.

Case 228.

Le Marque *vers*. Newman.

Notice of executing a writ of inquiry ought to ascertain

time and place where it is to be executed. Barnes 299. Prac. Reg. 447. Co. G. 133. S. C. Com. Dig. Tit. *Plader* (Z. 2.)

THIS was a motion to set aside a writ of inquiry for want of a proper notice of executing it.

The notice was given at the *Three Tuns* in *Brook-street* in *Middlesex*; and on an Affidavit that there were three *Brook-streets* in *Middlesex*; *Brook-street Stepney*, *Brook-street Hanover-square*, and *Brook-street Holbourn*, and though an Affidavit was made on the other side, that there was no sign of the *Three Tuns* in any of those *Brook-streets*, except in *Brook-street Holbourn*, and that writs of inquiry were usually executed there, yet the writ of inquiry and execution on it was set aside, for the notice ought to ascertain the time and place where the writ of inquiry is to be executed, so that the party may know certainly when and where to resort with his witnesses; and this ought to be done with so much certainty, that the defendant need not be put to the necessity of going over the county to inquire whither he is to resort; and therefore notice to execute it at the sheriff's office in *Northampton* (a) hath been holden ill; and so to execute it between ten o'clock and two in the afternoon; (1) and the writ

(a) Barnes 297.
Co. G. 113.
Prac. Reg. 446.

(1) There was a motion, in the in Barnes 295. Co. G. 99. Prac. Reg. case of *Hannaford v. Helman* reported 134. to set aside a writ of enquiry for uncertainty

writ of inquiry in this case was set aside by the opinion of all the Court.

Smith *vers.* Richardson. In C. B.

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Case 229.

THIS was an action upon the case for slander, in saying, *The plaintiff is a rogue and hath stolen my beer.*

In an action for words, upon not guilty pleaded, Whether the defendant can be admitted to give

evidence of the truth of the words spoken, (when they import a felony) in mitigation of damages. *Prac. Reg.* 383. *Barnes* 195. S. C.

The defendant at the trial before Baron *Fortescue* offered to give in evidence, in mitigation of damages, that the plaintiff was guilty of stealing his beer.

But the counsel for the plaintiff insisted that he could not, as the fact was felony, since he had pleaded not guilty; but he ought to have justified, and since he hath not justified, he shall not now charge the defendant with felony, though it be in mitigation of damages; and the Judge doubting of it, it was made a case for the opinion of the Court in which the action was brought.

Serjeant *Hawkins*: Any thing which mitigates the damages may in an action of the case be given in evidence where the recovery is wholly in damages.

That the malice of speaking may be excused is evident from many cases; why not the falsity of which he is accused in the declaration, by shewing that he spoke only what was true of the plaintiff?

In 2 *Cro.* 91. a man may shew in evidence, that he spoke the words not maliciously, but mentioned in a sermon only what he had read in the Book of Martyrs.

uncertainty of notice; the notice given was that the writ would be executed at ten in the forenoon, or as soon after as the sheriff could attend. The Court

unanimously agreed that this notice was irregular for it's uncertainty, and granted a rule to shew cause, which was afterwards made absolute.

The

SMITH v.
RICHARDSON.

The defendant acts in such a case at his peril, for if he attempts to prove the plaintiff a thief, and cannot do it, he aggravates the damage by charging him falsely in Court with such a crime.

[553] But if the thing to be proved be a bar of all the damages, if pleaded, why may it not be proved in mitigation?

Serjeant *Chapple contra*: It would be a great hardship on the plaintiff if the defendant should be at liberty to charge him with a felony at any time in any place, who hath no opportunity to make his defence against such a charge.

What was said or done at the same time may be given in evidence, and was now allowed by the Judge, and it was here done.

The cases cited chiefly go where the matter proved is in bar of the action, and defeats it.

It was ordered to be spoken to again. (1)

(1) In this case as reported by *Barnes* it is said, "that the point was reserved; that the twelve Judges met and eight were of opinion, that where the words amount to treason or felony, the defendant, on the general issue, ought not to be admitted to prove the truth of the words; and the *Poole* was ordered to be delivered to the plaintiff." In the report of the same case in the *Practical Register*, we find that, "on Friday the 11th of November the Judges met, and all agreed that where the words import a general charge of felony, it ought not to be given in evidence in mitigation of damages. Eight of the Judges were of opinion that where the words import a particular charge, it may be given in evidence. *Four contra*." p. 384. In the case of *Smithies v. Harrison*, reported in 1 Raym. 727. which was an action upon the case for words importing the committing of adultery by the plain-

tiff with *J. S.* it was determined by Lord *Holt* that the defendant in mitigation of damages might give in evidence that the plaintiff committed adultery with *J. S.* but not with any other woman. Chief Justice *Lee*, in the case of *Underwood v. Parks* reported in 2 Str. 1200. upon not guilty pleaded, refused to permit the defendant to prove the words to be true, in mitigation of damages. Saying, "That at a meeting of all the Judges upon a case which arose in the Common Pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was now a general rule among them all, from which no Judge would think himself at liberty to depart, and that it extended to all sort of words, and not barely to such as imported a charge of felony."

Gambier *vers.* Larkin. In C. B.

Case 230.

THIS was an action of debt on a bond, with a condition to be a true prisoner without making any escape.

When the defendant by his rejoinder departs from his plea, it is a good cause

of demurrer. 1 Ld. Raym. 233. 2 Ld. Raym. 1259. 1449. 1 Str. 422. 1 Will. 334.

The defendant pleads that *J. Larkin* did remain a true prisoner without committing any escape, &c. the plaintiff assigns a breach, that on the 13th of *January*, *J. Larkin* made an escape; the defendant rejoins, that *J. Larkin* went a little way out of the rules of the prison, but being sent for back by the plaintiff, that he immediately returned, and with the consent of the plaintiff was accepted as his prisoner, and so continued ever since; to which it was demurred.

Chief Justice *Reeve*. Here is a breach assigned, to which the defendant rejoins, that *Larkin* did make an escape, for he saith that he went out of the rules of the prison, which is an escape, 3 Co. 44. and so by the stat. 8 & 9 W. 3. c. 27. and then he returned with the consent of the plaintiff; now this is a departure; for if this would excuse the escape, it should have been pleaded at first.

But this plea in the matter of it is no excuse.

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It is not said that he was retaken on a fresh pursuit, but he returned (being sent for) without saying when, or after what time, or any thing in certain.

So judgment was given for the plaintiff.

Case 231.

Chambers *vers.* Gambier. In C. B.

In an action for an escape the defendant pleads that the prisoner escaped and returned before the action brought, without his knowledge, and was in execution for the damages on the said judgment; and it was holden well, it being tantamount to a retaking on a fresh pursuit.

THIS was an action of debt for the escape of one — *Laughton*. The defendant pleads, That *Laughton*, without the knowledge of the defendant the Warden of the *Fleet*, escaped, and before the action was brought, without the knowledge of the defendant returned, and was in execution for the damages on the said judgment; to which it was demurred.

Sayer, p. 422.

Judgment was given for the defendant, *Nisi, &c.* for this is tantamount to a retaking on a fresh pursuit; and the same plea was holden good *Hil. 8 Geo. 2.* in the case of *Grey and Gambier*.

Case 232.

Huxley *vers.* Clendon. In C. B.

The tender of a prisoner by his bail is not complete till the fees are paid.

THIS was a motion by Serjeant *Chapple* to vacate an entry of a surrender of a person to prison by his bail, made at Mr. Justice *Denton's* Chambers and signed by him, on an Affidavit, that *Clendon* and *Ambrose*, who were his bail, went to Judge *Denton's* chamber, and while the tender was making they talked about the fees, and *Clendon* said that he knew the fees as well as any one, but when the book was signed *Clendon* went away, and the gaoler said that he would take no care of him. 2 *Keb. 2. Farresly 77.*

Serjeant *Wright, contra*: The bail is not to pay the fees, and therefore the bail is not chargeable if not paid; here is

(1) It is necessary that an entry of such tender be made in the Marshal's book, which is kept in the King's Bench Office; it being holden that until such entry be made, the defendant is not in custody, so as to charge the Marshal in an action of escape.— 1 Salk. 272. 2 Str. 1226. 2 Burr. 1049. Tidd's Pr. 151. 1 Rich. Pr. K. B. p. 462.

no imposition that appears upon the Court or Judge, and a record was never vacated, but where the Court was imposed upon.

HUXLEY v.
CLENDON.

Per Cur. The query is, Whether here is not an imposition on the Court or the Judge, who acts in this case in aid of the Court where the render ought properly to be made; if a fee be due for the render, the render is not complete till paid, and the Judge who signs the entry of the *Committitur* on the bail-piece doth it on supposition that the fees are paid, and if they are not, he is imposed on, and the act ought to be set aside.

Ordered in the absence of Chief Justice *Reeve*, that the Judge's name to the render on the bail-piece be struck out.

Howes *vers.* Haslewood. In C. B.

Case 233.

THE declaration is laid in the city of *Norwich*, but *Norfolk* is in the margin, and a writ of inquiry executed there.

If the action be laid in one county and the *Venue* in another it is a *Jeofail*, and helped by

the Stat. 4th and 5th of *Anne*. Barnes, 483. S. C.

Serjeant *Wright*. If an action be laid in one county, and the *Venue* be laid in another county, it is fatal, and not helped by any of the statutes of *Jeofails*, and so are several cases adjudged. 1 *Rob. Rep.* 432. But afterwards, in *Hil.* 9 *Geo.* 2. it was holden by the whole Court, that it was helped by the stat. 4 & 5 *Anne*, c. 16.

Richardson *vers.* Pattison. In C. B.

Case 234.

IN an action *qui tam*, &c. on the stat. (a) 9 *Anne*, for that the defendant being a custom-house officer did solicit *A.* and *B.* to vote at the election of members for the city of *Carlisle*, the said *A.* and *B.* being electors, and having a right to vote at such election.

In an action *qui tam* on the stat. 9 *Anne*, against a custom-house officer, the plaintiff hath a right to inspect town-books, and take copies to be

used at the trial. Barnes, 235. S. C. (a) St. 9 *Ann.* c. 11. l. 49.

RICHARDSON
v. PATTISON.

It was moved by Serjeants *Chapple* and *Wright*, that a rule of this Court should be made, that the plaintiff may have liberty to inspect the town-books where the freedoms of the said *A.* and *B.* are inrolled, and take copies of the same, to be used at the trial of the cause; and the Court made a rule accordingly, Chief Justice *Reeve* absent; although it was objected that the plaintiff is no freeman, and ought not to be admitted to inspect into the books of the Corporation to make evidence for his action; nor is here any Affidavit, that the right of election was in the freemen.

1 Str. 646.

But it was answered, that the plaintiff hath a right, by being the plaintiff in the action, to see what relates to that fact on which the action is grounded.

Case 235.

Wayman vers. Wayman. In C. B.

Bail shall be given in an action of debt on a judgment, notwithstanding a writ of error, if there is no bail in the original action, otherwise not.
Prac. Reg. 57.
Barnes, 71. S. C.

SERJEANT *Chapple* moved for bail. The case was, judgment was given for the plaintiff, who brings debt on that judgment; the defendant brings error (1) on the original judgment, and puts in bail to the writ of error; and moved that no bail being to the original action, bail might be to the action of debt on the judgment. Mr. *Townsend* cited a case where Chief Justice *Eyre* consulted Judge *Tracy*.

(a) Prac. Reg. 54.
Co. G. 32. S. C.
Say. 43. 160.
1 Wilf. 120.
Barnes, 107.

(a) *Jackson* and *Duchot*, Hil. 13 Geo. If bail be in the original action in case, and debt be brought on the judgment, no bail shall be required; but if there is no bail in the original action, but a writ of error be brought upon it, and

(1) Bail is not requisite upon bringing a writ of error, upon a judgment in an action of debt founded upon a prior judgment, because it is a *casus omiffus* out of the stat. 3 Jac. 1. c. 8. which is to be taken *literally*, and not to be extended by construction. 3 Burr. 1548. 1 Bl. Rep. 506. S. C. 4 Burr. 2117.

then debt is brought upon the judgment, bail shall be given in the action of debt on the judgment, notwithstanding such writ of error. (2)

RICHARDSON
v. PATTISON.

(2) In *Kendal v. Carey*, reported in 2 Bl. Rep. 768. there was a similar determination founded upon the authority of the present case. And *Gould*, Justice, is reported to say, "The reason of this practice is, because there has never been bail given in *this Court*. The usage of the King's Bench, I believe, is different; but I think this Court is right. These are checks against delay, and ought not to be taken off."

D E

Term. Sanct. Hill.

10 Geo. II. In C. B.

Case 236.

Blacklock *vers.* Mariner.

Where the name of the defendant is made use of in the declaration by mistake, instead of the plaintiff's, it shall be helped after a verdict:

THIS was an action of trespass for an assault and battery on the 1st of *April*; the declaration charges another battery on the 2d of *April*; and a third battery by the defendant on the 3d of *April*.

Supra, p. 250. and the cases there cited. *Infra*, p. 367.

The first count was for a battery by the defendant on *John Blacklock*; the second and third counts were for a battery by the defendant on the said *Samuel*, which was the name of the defendant instead of the plaintiff, whose name was *John*; and a verdict being given for the plaintiff, and intire damages, Serjeant *Eyre* moved in arrest of judgment, because in this case the plaintiff recovers damages for the damages which the defendant received by the battery on himself.

Serjeant *Chapple*. This is a mere mistake in the clerk, and aided by the statute 16 and 17 *Car. 2. c. 8.* which helps all mistakes of the christian and surname of the parties who are once rightly named before in the same record, and here *John Blacklock* is named right in the first count, and then when the subsequent counts say, that the said defendant did assault and beat the said *Samuel Blacklock*, there being no such person named before, it appears evidently that it was a mere mistake;

take; and may be compared to the cases, where the plaintiff declares, that the defendant being indebted to the plaintiff, the said plaintiff did promise to pay to the defendant, or *vice versa*, which have been always helped after verdict. 4 Mod. 162. Resolved in the King's Bench between (a) *Staveley* and *Palmer*, 13 W. 3.

BLACKLOCK v.
MARINER.

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(a) *Supra*, p.
115.

And of that opinion was the Court, and judgment was given for the plaintiff,

Elizabeth, Executrix of William Cartlitch, Case 237.
vers. Sir John Eyles.

THIS was an action of *Assumpsit*, wherein the plaintiff declares, that the defendant, on the 27th of November 1729. in consideration that the testator at the defendant's request would give credit to *Thomas England* for any quantity of silver to work on as far as 300 or 400*l.* value, as the occasions of the said *Thomas England* should call for it, the said testator giving four or six months credit for payment, promised the testator to be answerable to him for the credit of the said *Thomas England*, as far as the said 300 or 400*l.*

How far an undertaking for a third person shall bind,

And avers, that her testator, relying on the said defendant's undertaking, at divers times between the 27th of November 1729, and the 18th of January 1733, gave credit to *Thomas England* for silver to work on as his occasions called for it, to the value of 400*l.* and gave credit for payment, sometimes for four, sometimes for six months; and that on the 18th of January 1733, there was due to the testator for such silver 338*l.* 3*s.* 2*d.* which *Thomas England* had not paid, and yet the defendant refused to pay the same,

On *Non Assumpsit*, and issue joined, the cause came to trial before Mr. Justice *Denton*, and to prove the promise in the declaration, a letter from Sir *John Eyles* was produced in these words;

CARTLITCH
v. EYLES.

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Mr. Tho. England, who delivers you this, is a silversmith, whose business is encreasing beyond his stock, and he has occasion for some credit, being obliged sometimes to work his stock out before he can get his money for the plate he makes. I have a very good opinion of his honesty, and would be answerable myself for his credit as far as 300 or 400l. If it be consistent with your business to give him credit for any quantity of silver to work upon to that value, as his occasions call for it (giving credit for four or six months payment); if this proposition be at all agreeable, or can be made so, I shall be willing to talk further with you, who am,

Sir,

Your humble servant,

John Eyles.

Directed to Mr. Cartlitch.

On this letter *William Cartlitch* the testator intrusted *Thomas England* from time to time with quantities of silver, amounting in the whole to 1379 l. for which he made *England* debtor in his book, and *England* always gave his note for the silver received, whereby he promised to pay for it, nor was any time limited for payment, nor did it appear that Sir *John Eyles* had notice that *Cartlitch* trusted him at all, nor did he countermand *Cartlitch* from doing so.

Mr. Justice *Denton* gave leave to move the Court upon this letter for their opinion, whether this letter was sufficient evidence of the promise in the declaration attended with the above circumstances, which he said was the whole of the evidence given.

Upon this evidence the Chief Justice and I thought a new trial might not be improper, since this letter was indeed proper evidence to be given to a jury to induce a belief, that Sir *John Eyles* had undertaken according to the declaration; and if it had been proved, that upon this letter Mr. *Cartlitch* had signified to Sir *John*, that he upon this encouragement would

would trust *England*, or that Sir *John* had any knowledge that he did intrust him with silver, and he did not controul his doing so, it might be sufficient for the jury to find for the plaintiff.

CARTLITCH
v. EYLES,

But as the letter only imported, that he had an opinion of the honesty of *England*, and on that account, was inclined or disposed to become answerable as far as 3 or 400 *l.* if consistent with his business to give such credit (for that is as much as the words can reasonably be strained to, it not being said, *I will be answerable*, but *I would, or am inclined, or minded to be so upon terms*) and then going on to tell him, *that if the proposition was agreeable, or could be made so, he would talk farther with him*; it seems to be only a proposal or communication, and not a compleat agreement, but a proper evidence, which with other circumstances concurring might be conclusive.

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And therefore if the defendant was privy to the trust given, and did not controul it, or was acquainted with the letter's being delivered and accepted, it might be fit to charge the defendant.

But it may be hard to charge him in case he had no notice, which by the Judge's report of the case did not appear to have been given.

That *Cartlitch* trusted him upon the receipt of this letter does not import any notice to Sir *John Eyles*, for it appears not that he trusted him on Sir *John's* account, for the credit in his books was given to *England*, and he took notes for the money from him,

No mention at all is made that it was done on the defendant's account, and it is usual evidence, when credit is given on another's account, to see how the credit is entered in the plaintiff's books,

CARTLITCH
v. EYLES
Nov. 22.

It is certain that *Assumpsit* lies not upon mere communication, 1 *Roll. Abr.* 6. and this seems no more.

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It refers to a future treaty or parlance, and if that had been so, the defendant might have been vigilant how *Thomas England* went on in his trade, might have put a stop to the credit given whenever he saw cause, or might have taken security from him, which, having no notice of such trust or dealing, he could not do.

But Justice *Denton* and *Fortescue* thought the letter itself contained a full promise from the defendant to pay what the testator credited him for not exceeding 3 or 400 *l.* that the words (*would be*) were the same as *will be*, and that the conclusion of the letter was rather artful than a design of farther treaty; and therefore a new trial was denied (1).

(1) " At *Nisi Prius* the plaintiff had verdict; and on a motion for a new trial, the Court were divided in opinion; and no rule being made, the plaintiff was at liberty to sign final judgment." Barnes, p. 422.

Case 238.

Leaver *vers.* Witcher. In C. B.

Motion to plead
doubt denied,
after a judgment
that had been
regularly ob-
tained was set
aside on payment of costs.

THIS was a motion to set aside a judgment; which was granted on payment of costs, although the judgment was regular.

Barnes, 253. *Prac. Reg.* 235. Co. G. 139. S. C.

It was afterwards moved, that the defendant might have liberty to plead the general issue, and likewise *non assumpsit infra sex annos*.

But it was denied; for when a judgment is regular, and set aside upon the entreaty of the defendant to let him in to try the merits of the cause, it shall be only allowed to plead the general issue, and not the statute of limitations or
other

other defensive plea, that goes not to the merits of the cause. (1)

(1) Where a plea of justification was absolutely necessary to try the merits, and the plaintiff had not been delayed of a trial, the Court have admitted the defendant to make such defence, though the judgment set aside was regular. Co. G. 139. Barnes, 253. It is said in the report of this case in the *Practical Register*, that the Court determined, "that for the future, when a judgment was set aside on payment of costs, instead of plead-

ing an issuable plea, the rule should be to plead the general issue;" which they declared was the old practice of the Court. An administrator, however, was permitted by the Court, in the case of *Cruise v. Williams*, reported in *Prac. Reg.* p. 236. Barnes, 260. after a regular judgment was set aside upon payment of costs, to plead *piene administravit* generally, which was looked upon as the general issue.

Termino Pasch.

10 Geo. II. In C. B.

Cafe 239.

Shelley verſ. Wright.

The county being in the margin will ſupply the want of it in the declaration.
Barnes 338.
S. C.

THIS was an action of debt on a bond for 400*l.* wherein the plaintiff declares, *Middleſex, to wit*, in the margin; *George Wright* of *Weſtminſter*, Eſq; otherwiſe called *George Wright* of the pariſh of *St. John the Evangeliſt, Weſtminſter*, in the county of *Middleſex*, was ſummoned to answer *Charles Shelly*, Eſq; in a plea that he render him 400*l.* &c.

The defendant after *Oyer* of the bond and condition (which was that the defendant give a true ſtate of all fees, &c. received by him in the office of the plaintiff, as auditor of the alienation office, and pay the ballance, &c.) prays judgment of the writ, for that in the writ and declaration there wants the addition of the county where the defendant is converſant.

To which it was demurred; (1) and it was argued that it was not ſufficient within the ſtatute, 1 *H. 5. c. 5.* to give the addition in the *Alias diſſ.* Reſolved *Cro. Eliz. 198, 2 Leon. 183. S. C. Mo. 354.*

(1) In the report of this caſe in *Barnes*, it is ſaid that the plaintiff moved to ſet aſide the plea, and obtained a rule to ſhew cauſe which was diſcharged. The Court obſerving that it was not uſual to ſet aſide ſuch pleas upon motion, but that the plaintiff might demur if he thought fit, as was determined between *Norris* and *Friend*,

Serjeant

Serjeant *Skinner* for the plaintiff insisted, that the county in the margin will supply the want of it in the declaration, and so it was holden in the case of *Norris v. Friend Mich. 4 Geo. 2.* The declaration was *Robertus Friend nuper de Westminster in Comitatu tuo*; there was a demurrer to the plea in abatement for the want of addition, as here, because *in Comitatu tuo* refers to nothing, being uncertain; but it was holden that the county being in the margin supplied the omission, and that the words *in Comitatu tuo* should be rejected as insensible; and by the course of the Court of Common Pleas the county in the margin is part of the declaration, though it be not holden so in the King's Bench; county in the margin supplies the omission of it in the declaration.

SARLES W.
WRIGHT.

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It is true in an indictment the omission of the county is not helped by naming the county in the margin. (2)

And the opinion of the Court was, That the plea was ill; and a *Respond. Ouster* was awarded.

(2) "*Suff.* in the margin, the indictment supposing a fact done, *apud* margin." 2 Hale's, P. C. p. 180. *S. in com' prædicta* is good, for it re-

Skip *vers* Hook. In C. B. Inter. Hil. Case 240.
10 Geo. 2. Rot. 369.

THIS was an action of *Assumpsit* on a promissory note by the defendant to pay *William Welch* or order 50*l.* for value received; that *William Welch* indorsed it over to the plaintiff, in consideration whereof the defendant promised to pay to the plaintiff, who, though often requested, refused, &c.

In an action on a promissory note against the drawer, the plaintiff need not allege notice to the defendant of the indorsement.

The defendant demurs, and shews for cause, that the declaration did not alledge notice to the defendant of the indorsement, and relied on a case in 8 Mod. 123. *Lawrence (a)* and *Jacob*, where, after a verdict and judgment for the plaintiff, the judgment was reversed in error for that cause.

(a) 1 Str. 575.
S. C.

Sed

SKIP v. HOOK. *Sed non allocatur*; for that case is misreported, for Justice *Fortescue* produced the paper-book in that case, and said it was *Pasch. 8 Geo.* and that the judgment was affirmed, and on the authority of that case, and on the reason of the thing; for the defendant by his demurrer admits that in consideration of the premises, (*viz.*) the defendant's making the indorseable note, and the indorsing it to the plaintiff, the defendant assumed to pay the money according to the tenor of the note.

Judgment was given for the plaintiff by the whole Court,

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Case 241.

Spinks *vers.* Bird. In C. B.

An exigent is
superseued by a
writ of error.
Barnes 434.
Prac. Reg. 184.
S. C.

THERE was a judgment for the plaintiff; a *Cap' ad Satis* issues thereon against the defendant, upon that *Ca' Sa'*, an *exigent* was taken out, tested on the 7th of *February*, then a writ of error was sued by the defendant, tested on the 5th of *February*, and allowed on the 8th of *February*.

q. Barr. 2454.

Serjeant *Chapple* moved that the plaintiff might proceed to outlaw the defendant, notwithstanding the writ of error; as if debt be brought on a judgment, and then a writ of error is sued on the judgment, the Court will permit the plaintiff in that action of debt to proceed to judgment, though they will stay execution.

Serjeant *Parker, contra*: The writ of error is of itself a *Supersedeas*.

(a) Godb. 250.
S. C.

It is true that it is no contempt till notice, but by taking out the writ of error the Court is stayed from proceeding in the execution, 2 *H. 7.* 12. (a) 2 *Cro.* 342. *Godb.* 439. 1 *Vent.* 30. 1 *Mod.* 28. The form of the writ of *Supersedeas* in error shews that an exigent is superseded. *Rast. Ent.* 309. b. pl. 10. *Off. Br.* 378. *Thef. Br.* 293. *Cliff.* 693, 694.

And

And of that opinion was the Court, for the exigent is only to carry on the execution.

Goodtitle *vers.* Bradburne & al'. In C. B. Case 242.

THIS was an action of ejectment on the demise of *Isaac Colman*; and on the general issue pleaded a special verdict was found to this effect:

Whether a husband seised jointly with his wife, can without her make a good tenant to the precipe.
Cruise on Rec. 213.

Richard Lowth seised in fee, conveys to *Robert Colman* and *Mary* his wife, and to the heirs of the body of *Robert Colman* on the body of *Mary* his wife to be begotten, and for want of such issue, to the heirs of the survivor.

By an indenture of lease and release, *Robert Colman* without his wife, conveys to *Edward Habersfield* and his heirs, to make him tenant to the precipe, on which a recovery was suffered, and was declared to the use of *Robert Colman* and his heirs; *Robert Colman* dies without issue, his wife survives; *Isaac Colman* his son and heir by a former wife, after the death of *Mary* his wife, claims as heir to *Robert Colman*, and brings his ejectment against those who claim as heir to *Mary* the wife, who was the survivor.

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Serjeant *Eyre* insisted, That this recovery was good to vest the estate in the husband and his heirs, and prevent the taking of the heir of the survivor.

And this depends upon this question, whether the husband alone could make a good tenant to the precipe. *

It is plain, if the husband be seised in the right of his wife, he by bargain and sale may make a good tenant to the precipe. 2 *Roll. Abr.* 394.

If the husband be jointenant with his wife and levy a fine, that makes a good tenant to the precipe; so it was held in *Cupledyke's case*, 3 *Co.* 6. *Mo.* 210. 2 *Roll. Abr.* 395.

Serjeant

GOODTITLE v.
BRADRUEN.

Serjeant *Belfield*, *contra*: I admit the cases which say a man seised in right of his wife may make a tenant to the precipe; but here the husband is not seised in right of his wife, but both are equally seised, for they take by entireties, therefore in such a case the husband alone cannot make a tenant to the precipe.

And so it was resolved in the case of *Owen and Morgan*, 3 Co. 6. Mo. 210. And this case is to the same effect in the reason of it. 1 Sid. 83. 3 Lev. 107, 108.

So it was resolved in 2 Salk. 568.

But it was adjourned.

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Case 243.

Steward of Bury *vers.* Rabutin Sheriff of Suffolk, In C. B.

The sheriff's
deputy is to be
entered on re-
cord.
1 Rich. Pr.
C. P. 66.

THIS was a motion, stating that the sheriff of Suffolk hath usually appointed a deputy at Bury in order to receive and return writs, which the present sheriff refuses to do.

The rule was enlarged to shew cause why he should not make a deputy in the town, pursuant to a rule of this Court, Hil. 14 & 15 Car. 2. Hil. 15 & 16 Car. 2. and Trin. 1 Jac. 2.

The rule was enlarged to the first day of next term, Trin. 10 & 11 Geo. 2. Then the rule was discharged, there being no cause in Court relating to this matter, nor any complaint by the suitor of the Court.

Ordered, That for the future the sheriff's deputy be entered on record.

Harvey *vers.* Stokes. In C. B.

Case 244.

THIS was an action of debt on a replevin bond; the defendant pleads that she did prosecute the replevin with effect, and the sheriff was not damaged; the plaintiff replies that the plaint was removed by *Recordari* to the Common Pleas, where judgment was given for *Thomas*, who was plaintiff in the suit, and a return adjudged *prout per Record'*; and so the said *Rebecca Stokes* did not prosecute with effect; nevertheless the said *Thomas* (who was plaintiff in the action) did not return the cattle, and this he is ready to certify; to which the defendant demurred, and the plaintiff joined.

The mistake of the name of a third person is not aided or amendable, though a misnomer of the plaintiff or defendant is.

And for cause of demurrer the defendant shewed that the plaintiff hath not verified his replication.

This case was argued several times, and two objections made.

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First, That that is shewn for cause of demurrer.

Secondly, That no breach of condition appears; for the condition is to prosecute with effect, and if adjudged there should be a return, that she would make return.

Now though it be shewn that *Rebecca* did not prosecute with effect; it is not shewn that she did not return the cattle, but only that *Thomas*, who was the plaintiff in the suit, did not return the cattle.

So there is no breach at all of the condition appearing.

And now Chief Justice *Willes* gave the opinion of the Court for the defendant, because the plaintiff had assigned no breach, and the mistake of the name of a third person is not aided or amendable, though a misnomer of the plaintiff or defendant be so. *Bridg.* 100. 2 *Lev.* 117. But as to the word *certify* instead of *verify*, the Court held it to be to the same purpose, and well enough.

Sopra p. 557

Term. Sanct. Trin.

11 Geo. II. In C. B.

Case 245.

Trevet *vers.* Angus.

In a defesance
to a bond, it is
not necessary to
recite the bond.

THIS was an action of debt on a bond, dated the 4th of *June*, 1727. for 80*l.*

After oyer of the bond and condition, which was to pay 40*l.* and 20*l.* on the 25th of *December* then next, the defendant pleads, that on the 12th of *March*, 1729. there being but 40*l.* due on the said bond, the plaintiff did covenant, that if the defendant did pay 5*s.* in the pound on the 25th of *December* next for every 20*s.* due to the plaintiff from the defendant, and so at the same rate for every greater or less sum than 20*s.* on or before the 25th of *December* next, then the plaintiff should and would accept the same composition of 5*s.* for every 20*s.* in full discharge of all sums of money as then were or on the said 25th of *December* should be due from the defendant to the plaintiff, and that on payment of the said sum of 5*s.* in the pound, or 5*s.* for every 20*s.* to the plaintiff, according to the intent of the said deed, then the said deed should be a release to the defendant, to be pleaded or given in evidence.

That on the 12th of *March*, 1729. she was not indebted more than 40*l.* and then she tendered 10*l.* which was 5*s.* in the pound, which the plaintiff refused to accept.

The

The plaintiff demurs, and shews for cause, that the defendant did not shew that she was still ready to pay. TREVELT v.
ANGUS.

Serjeant *Wright* for the plaintiff insisted, that this was no defeazance, but a covenant; For, [569]

First, It has no relation to the money due upon the bond; for although it saith by way of recital, or supposal rather, that money was due from the defendant to the plaintiff, and the defendant avers, that she was indebted by bond in 40*l.* and interest, and all but 40*l.* was paid to the 12th of *March*, 1729. yet the words of the deed are, *That if the defendant pay 5*s.* in the pound for every 20*s.* due to the plaintiff from the defendant, and so at the same rate for every greater or less sum than 20*s.* on or before the 25th of December, the plaintiff should and would accept the same in discharge of all sums as then were or on the 25th of December should be due from the defendant to the plaintiff.*

So that the deed imports, that 5*s.* in the pound should be paid, not for the sum in the bond, but for whatever sum of money should be due to the plaintiff from the defendant on the 25th of *December* next.

Secondly, It is to be a release on payment of the money; and though tender and refusal may be equivalent to payment, and he covenants to accept this composition, his non-acceptance is a breach of his covenant, but it becomes not a release till payment.

Thirdly, She should have pleaded it with an *Uncore prift*; for although a tender of a collateral sum being made, if it be refused, need not be pleaded with an *Uncore prift*; yet when the payment is to be of a less sum in lieu of a greater, it ought to be so pleaded.

But it was recommended to the parties to agree this matter, it being hard, when a composition was agreed to by the plaintiff, that he should come upon the defendant for the whole debt.

TAYLOR v.
ANGUS.

And on the other side it would be hard that the plaintiff should lose the 5*s.* in the pound, which the defendant tendered, though she hath not brought the money into Court, if this be necessary.

But the plaintiff not complying to any end, now the last day of *Trinity Term*, on the 21st of *June*, 1738. the Chief Justice delivered the opinion of the whole Court for the defendant; and gave the reasons in answer to the objection made.

First, This is a defeazance to this bond, and sufficiently relates to it; for it is not necessary to recite the bond, any more than where a power of revocation is inserted in a deed; a revocation by a subsequent deed is good, though it doth not recite or mention the power, or in direct words refer to it. 10 *Co.* 143, 144. *Scroop's case*.

They also held, that it was not necessary in this case to plead with an *Uncore priſt*, or to bring the money into Court. 2 *Show.* 129. *Co. Lit.* 207. 9 *Co.* 79. *b.* *Cro. El.* 755. *Mo.* 36.

Case 246. Matlem verſ. Bingloe & Un' & Al'. In C. B.
Intr. Trin. 11 Geo.

A papist may
devise his estate
to be sold in or-
der to pay money
which he owes
other papists,
notwithstanding
the statute
21 & 22 H. 3.
c. 4. 2 *Eq. Abr.* 626. pl. 26. *S. C.* *Infra* p. 668.

THIS was an action of ejectment on the demise of *John Marſh* and *John Amyas*, of a messuage, garden, orchard, 100 acres of land, and 100 of meadow, and 100 of pasture, in *Woodriſing* in the county of *Norfolk*, made on the 10th of *April*, 10 *Geo.* for sixteen years.

At the affizes at *Norwich*, on the 26th of *July* last, before Chief Justice *Raymond*, a special verdict was found to this effect:

John Bedell was seised in fee of the premises in question on the 1st of *February*, 1707. and was a papist, and died so seised on the 28th of *February*, 1707.

That

That *George Bedell* his brother and heir was born, on the 1st of *August*, 1683. and was under the age of eighteen years at the time of making the act for the further preventing the growth of popery, and of the age of twenty-four years at the time of his brother's death; on whose death he entered into the premises as heir to his brother, but was a papist, and continued so to his death, and never took the oaths, nor subscribed the declaration, 30 *Car. 2.*

MATLEM &
BINGLOE.

By will, dated the 9th of *August*, 1715. *George Bedell* devises the lands and tenements in question to *John Marsb* and *John Amyas* and their heirs, to the use of them and their heirs, on trust that they in the first place, by and out of the rents and profits, or by mortgage or sale, &c. raise money sufficient to pay all the debts he should owe at his decease to *John Marsb*, and all his other debts and legacies and funeral charges, and the charges in executing the trusts; then to pay 150*l.* a year to his sister *Elizabeth*, wife of *John Matlem*, for her life; and 25*l.* a year a-piece to his sisters *Isabelles* and *Mary* for their lives; and subject to these trusts shall permit *Robert*, son of *John Matlem*, to receive the residue of the profits of what remains unfold till the age of twenty-one, and then shall convey to *Robert Matlem* and his heirs; and died on the 19th of *August*, 1715.

That four days before his death, *Elizabeth*, wife of the defendant *John Bingloe*, who was his sister and next of kin, and a protestant, entered and took possession; that after his death *John Marsb* and *John Amyas* the trustees entered, and demised to the said *Robert Matlem* the plaintiff for sixteen years, whom *John Bingloe* and his wife ousted; and upon this demise he brings his ejectment.

The general question was, Whether *George Bedell*, being under eighteen at the time of the making of the statute 11 & 12 *W. 3. c. 4.* attaining afterwards his full age, and not taking the oaths or qualifying himself as that statute requires, could make the devise to these trustees who are

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BINGLOE.

protestants, upon trust for payment of debts and legacies, and afterwards for *Robert Matlem* a protestant.

And as to that point it was argued by Serjeant *Wright* for the plaintiff, that a papist, notwithstanding the statute 11 & 12 W. 3. is enabled to dispose of his estate by will.

Infra p. 672.

He hath the freehold in him, he is seised, else he could not convey; and as he may convey by deed, so he may likewise devise.

It is true, if he devise to a papist, such devisee is disabled by that statute to take, for the devisee must take by purchase.

9 Mod. 181.
2 P. Wms. 4.

So if he devise to protestants in trust for papists, or to raise money, or pay legacies, such trust or legacy would be void; and that was the case of *Roper* and *Ratcliff*.

And in *Easter* Term, on the 13th of *May*, 11 Geo. judgment was given for the plaintiff by the whole Court.

(a) St. 1 Jac. 1.
c. 4.

And Chief Justice *Willes* gave the reasons of the judgment, viz. That though *George Bedell* was under eighteen at the time of the making of the statute 11 & 12 W. 3. yet after professing himself a papist, and not taking the oaths, he is disqualified as well as other papists; yet the disability incurred by this statute is very near the words in the statute 1 Jac. (a) which do not prevent his having or being seised of the estate, and consequently he may dispose of it; he may take any personal legacy or gift, so that he cannot be resembled to a monk, &c. He may bring waste, nay he may take a real estate *sub modo*, &c. he takes for the benefit of his protestant heir till he conforms, and for the benefit of himself when he conforms.

(b) *Supra* p.
207.

The inheritance must be in some body, it cannot be in the King, for it is given to another; it cannot be to the next of kin, for he hath but the rents and profits; it cannot be in his heir, for *nemo est heres viventis*; *Thornby* (b) and
Fleet-

Fleetwood on the stat. 1 Jac. 1. and *Hob.* 73. on the stat. (a) 3 Jac. 1. shew that they who were papists were seised, notwithstanding those statutes; and clauses which give papists actions of debt and waste strengthen this construction.

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BINGLOE.
(e) St. 3 Jac.
1. c. 5.

Besides, it seems most agreeable to the intent of the legislators, which was to encourage the bringing papists' estates into the hands of protestants, which is best done if they may devise or convey to them.

As to the trusts upon which this estate is devised, the annuities and legacies are all to protestants, and the remainder is to *Robert Matlem* a protestant.

But it was objected, that if a papist can devise his estate to be sold for payment of debts, he may run in debt to papists, and so sell his estate from his protestant kin.

But it is not found that any debts are due to a papist, and it shall not be intended that they are so; it will be time enough to consider this when it comes to be the case.

But a papist may sell his estate and give the money to papists; Why may he not devise it in order to pay what money he owes them?

Judgment was given for the plaintiff.

Matravas vers. Adlam and Brown. In C. B.

Cafe 247.

THIS was a *Scire Facias* against the defendants on a recognizance of bail for *Aaron Laws*, wherein they are bound to *John Matravas* the younger in 92*l.* on condition, that if the said *John Matravas* recover against the said *Aaron Laws*, and he did not pay, &c. they should render the defendant, or pay condemnation; then alledges, that although the said *John Matravas* the younger, by the name of *Matravers*, recovered judgment *M.* 10 *Geo.* 2. against the said *Aaron Laws* 80*l.* and 15*l.* 10*s.* costs, and

In a *Scire Facias* on a recognizance of bail, the defendants demurred, because it was not sufficiently averred, that the plaintiff was the same person to whom they were bound; but held no cause of demurrer. Barnes 431. S. C.

MATRIVERS v. ADLAM. had not been paid, yet the defendants had not rendered, &c. The defendants demur.

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And Serjeant *Belfield* insisted, first, That the bail was not liable, because the recognizance is to *John Matrovers* the younger, and there is no averment, that the plaintiff in the action, named *John Matrovers* without addition, is the same person,

Regist. 344.

(e) *Co. l. 283.*
Falm. 386, 5, 6.

Secondly, If there was an averment, it would not help, any more than if *Edward* signs a bond, and is sued by the name of *Edmund*, which is his true name, to say *Edmund* by name of *Edward*, &c. became bound, &c. *Cro. El. 897.*
3 Cro. 640. (a) Lut. 894, 895.

Sed non allocatur; for here is a sufficient averment, and it is not like the cases cited; therefore judgment was given for the plaintiff,

Case 248.

Moravia vers. Sloper & al'. In C. B.

In justifying under the process of an inferior Court, it is necessary to shew, that the precept levied was within the jurisdiction of the Court. *1 Ld. Raym. 329; 4 Burr. 2109; Comp. 12.*

THIS was an action of trespass for an assault, battery and false imprisonment.

The defendants as to all but the assault and imprisoning, and detaining in prison twenty-eight days, pleaded Not guilty.

As to the assault, imprisoning and detaining in prison twenty-eight days, the defendants plead, That the borough of *Devizes* is an antient borough, and on the 9th of *May*, 1735. at a court holden for the said borough within the jurisdiction of the said borough, before the Mayor, Recorder, and three Councillors of the said borough, by virtue of letters patent of King *Charles* the Second, dated the 5th of *June* in the 15th year of his reign, *James Batten* levied a plaint against the plaintiff of a plea of trespass on the case, to his damage of 40 *l.* and prayed process; and thereupon at the

the same court a precept issued to the bailiffs and serjeants at mace of the court, commanding them to take the plaintiff, and to have his body before the Mayor, Recorder, and three Councillors, at a court to be holden on *Friday* the 6th of *June* next; which precept on the 9th of *May*, 1735. aforesaid, was by *William Salmond*, attorney of the plaintiff *James Batten* in the said suit, and at the request of *James Batten* delivered to *James Williams* and *James Parker*, two of the defendants, who with the other defendant *Robert Sloper*, arrested the plaintiff, and detained him for the said twenty-eight days, till at the court on the 6th of *June* following, holden before the Mayor and three Councillors by virtue of the said letters patent, they returned the precept duly executed, which is the same assault, &c.

MORAYIA v.
SLOPER,

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To which plea the plaintiff demurs, and the defendants join in demurrer.

And for the plaintiff it was insisted, that this plea is ill.

For first, It doth not shew, that the matter for which this precept was levied was within the jurisdiction of the Court; and although the officer (1) may be excused who is bound to obey the precept, although the matter be not alledged to be within the jurisdiction, 1 *Lev.* 95. yet the plaintiff in the action, and *Sloper* who is a stranger, ought to shew it. 3 *Lev.* 20. 243. 1 *Vent.* 369. 2 *Mod.* 29. (a) 195.

(a) 1 *Freem.*
193. S. C.

And if the plea is ill as to one defendant, it is so to all, if they join in pleading; and so it was holden in the case between *Richard* and *Bowler*, 3 *W. & M.*

And by the Court the plea is ill for that cause, and was so determined in this court *Tr.* 8 *Geo.* 2. and in the case of *Gwyn* and *Pool*, 2 *Lut.* 1560. The reasons are,

(1) It was determined in the case of *Higginson v. Sheif* reported, *supra* p. 143. That an officer was chargeable for the escape of a person, where the action arose out of the jurisdiction of the Court, by whose process he was taken,

MORAVIA v.
SLOPER.

First, That the plaintiff might not know the extent of the jurisdiction, but it is his default to sue where he knows not the jurisdiction, when he may sue in courts above.

[576]

Secondly, The defendant may plead to the jurisdiction of the court, but that is not an adequate remedy; and then this plea is likewise ill, because it does not appear that the Court of *Devizes* had jurisdiction in personal actions. And this is bad even in respect to the officer, for it must have been shewn that the justice of the peace had authority in the matter.

Thirdly, There was a *Capias*, although no summons or precept. 1 *Vent.* 220.

Judgment was given for the plaintiff. (2)

(2) It is laid down in the case of *jurisdiction of the Court, the defendant Truscott v. Carpenter* reported in 1 *Ld. Raym.* 229. That neither the officer, it; and if he does not, the affair of the jurisdiction is over, and he shall not take advantage of it in any collateral action against the plaintiff, or if the cause of action arose out of the whether the cause of action arose out of the jurisdiction of the Court. For the officer who executes the process.

Case 249.

Reason *vers.* Lisle. In C. B.

In an action of
debt upon the
Statute 5 Ann.
c. 14. for keep-
ing and using a dog to kill the game, it is necessary to shew what sort of dog it was.

THIS was an action of debt on the statute 5 *Ann.* c. 14. on five several offences against that statute.

The first and second counts were, That the defendant used an engine called a gun.

The third count was, That the defendant kept and used a dog to kill and destroy the game, not being qualified by the statutes of this realm so to do.

The fourth count was, that the defendant exposed to sale an hare, not being intitled to the said hare under any person qualified to kill game.

The

The fifth count was, That the defendant exposed a pheasant to sale, not being intitled under any person qualified to kill game.

REASON OF
LISE.

After *Nil debet* pleaded, a verdict was found for the plaintiff and damages.

And now the defendant moved in arrest of judgment, and took several exceptions.

First, That it does not appear on which count the damages are found.

Sed non allocatur; for it is frequent when several counts are in a declaration, that damages are given more or less than the sum in any one count, and yet holden well.

[577]

Supra p. 524.

Secondly, That the two first counts are for keeping or using a gun, whereas a gun is not mentioned in the statute. *Sed non allocatur*; for if he had been charged for using a gun to destroy the game contrary to the form of the statute, this after a verdict had been sufficient; for the statute saith, if any use tunnels or any other engine to destroy the game; and after a verdict for the plaintiff the Court must intend, that the jury thought a gun an engine to destroy the game; and so it was resolved in this Court between *Blewit qui tam*, &c. ver. *Needs*.

Supra p. 523.
525.

But here the declaration saith that the defendant used a certain engine called a gun, which is not so strong as the case of *Blewit* and *Needs*.

Thirdly, The plaintiff does not alledge, that the defendant was not qualified by the laws of this realm, but that he was not qualified by the statutes of this realm, and a person may be qualified by law to *Hunt*, though not qualified by the statute law; which is in the negative, that not having such an estate he shall not be qualified.

Sed non allocatur; for the words may well import as much as being unqualified, or not qualified.

Fourthly,

REASON &
LIEKE.

Fourthly, That in the third count the plaintiff declares, that the defendant kept and used a dog to kill the game, without saying what sort of a dog; it might be a mastiff dog, or lap dog, which might chance to kill game; and the statute, 5 *Anna*, c. 14. upon which this action is founded, mentions only greyhounds, setting dogs and lurchers.

And therefore the action for the penalty given by this statute ought to conform to it, and shall not be extended by equity, being a penal law,

[578] And though the statute 22 & 23 *Car.* 2. *cap.* 25. mentions dogs generally, and that be confirmed by this statute, yet it doth not give the penalty of 5*l.* to every thing forbidden by that statute, wherein the penalty is 20*l.* only. And of this opinion was the whole Court.

Fifthly, It was excepted, that the two last counts alledge the facts against the form of the statutes; whereas there is but one statute against exposing hares, &c. to sale.

But the Court took no regard to this exception, for there are several acts about hares, &c. And the statute 9 *Anna*, c. 25. relates to this matter. But for the fourth exception the judgment was arrested. (1)

(1) In the case of *Hooker v. Mills* has not the word *bound*; and the words *other engines coming after tunnels*, &c. (which was an action of debt upon the stat. 8 *Geo.* 1. c. 19. for using an hound to destroy game) after a verdict for the plaintiff, the judgment was arrested, because the stat. 5 *Ann.* c. 14. are applicable only to inanimate things. And that, being a penal law, could not be extended. 2 *Str.* 1126.

Case 259. *Fawcett vers. Strickland & al.* In C. B. Intr. Pasch. 19 Geo. 2, Rot. 383 and 384.

Right of Com-
mon of Pasture
and Common

of Turbary
will not hinder the lord's improvement by inclosure, if he leaves sufficient common for the tenants of the manor. 1 Vent. 54. 2 Keb. 590 S. C.

THIS was an action of trespass for chasing the plaintiff's cattle.

The

FAWCETT v.
STRICKLAND.

The defendants plead that the defendant *Strickland* is lord of the manor of S. in which are several large wastes; that he improved 700 acres of one of these wastes called *Blew-Castle Common*, leaving sufficient common for the tenants of the said manor; that the plaintiff put his cattle into the part so inclosed; and that they with a dog chased them out, which is the same, &c.

The plaintiff replies, That he is tenant of the manor and hath right of common of pasture for all commonable cattle levant and couchant on his tenements there in the said waste, and likewise the plaintiff hath common of Turbary in the said waste, so that inclosure is unlawful,

The defendants demur, and shew for cause, that the replication was double, and doth not deny or confess that there was sufficient common left.

As to the causes shewn for demurrer, they are of no regard; for the replication means not to insist on double matter; but the mention of the right to common of pasture is to introduce the claim of common of Turbary, which is insisted on as an argument why such common of pasture is not within the statute of (a) *Merton*. (1)

[579]

(a) St. 20.
Hia. 3. c. 4.

So the whole question is, Whether a lord can improve a common by virtue of the statute of *Merton*, where a man has common of pasture and common of Turbary in the same waste?

It is certain that common of Turbary or *Pischary* is not within the statute. 2 *Inst.* 37.

But here the action is for chasing cattle put into the waste to use his common of pasture; then although the same

(1) The following are the words of the statute. "Ita provisum est et concessum, quod quicunque hujusmodi feoffati assisam nove disseisine deferant de communis pasture sue, et coram iusticiariis recognitum fuerit, quod

tantam pasturam habeant, quantum sufficerit ad tenementa sua, et quod habeant liberum ingressum et egressum de tenementis suis usque ad pasturam suam, tunc inde sint contenti."

plaintiff

**FAWCET v.
STRAICKLAND.**

plaintiff has common of Turbary, that will not hinder the lord's improvement, for they are distinct rights. And in *Hil. 11 Geo. 2.* judgment was given for the defendants by the whole Court.

Cafe 251.

Pardo vers. Fuller. In C. B.

In an action on a promissory note against the indorser, there ought to be evidence of a demand upon the drawer, but that is a fact to be left to the jury.

THIS was an action on a promissory note against the indorser.

At the trial before Chief Justice *Willes* at *Guildhall* it was doubted, whether the plaintiff ought not to prove a demand upon the drawer before the action was brought; the matter of proof was left to the jury, whether a demand was made, or not.

[580]

On a motion for a new trial, Judge *Fortescue* mentioned the case of *Davies and Mason*, 1 *Geo. 2.* in the court of Common Pleas, wherein it was agreed by the Court, that there ought to be a demand upon the drawer, for the indorser undertook conditionally only if the drawer did not pay.

Indeed if a note be forged, Chief Justice *Holt* held the indorser liable, though no demand.

And indeed no demand can be, for when a note is forged there is no drawer.

So on a note payable to a man or bearer, no demand need be from him to whom it is made payable.

But a new trial was denied, for the evidence of the demand was left to the jury, who were the proper judges of that fact, and knew best the course of dealing. (1)

(1) It is determined, in the case of *Heylin v. Adamson*, reported in 2 *Burr.* p. 669. which examines and reconciles the authorities upon the subject, "that to

Anonymous.

Case 252.

THIS was a motion to amend the declaration delivered, and the award of the Court thereon.

*Viscomiti Lond.
præcipimus tibi
instead of Vice-
comitibus Lond.
præcipimus vobis*
Barnes 484. S. C.

was holden amendable after verdict.

Lond. was in the margin, the fact was laid at *Tame* in the county of *Oxford*, but the award of the *Venire* was to the sheriffs, and went to the sheriff of *Oxford*, and was tried by a jury of the county of *Oxford*; and after a verdict it was insisted that this was a mis-trial; for being laid in *London* (for *London* is in the margin) and the award of a *Venire* being to the sheriffs, there being but one sheriff unless in *London*, it must

to entitle the indorsee of an inland bill of exchange to bring an action against the indorser, upon failure of payment of the drawer, it is *not* necessary to make any demand of, or enquiry after, the first *drawer*." This point had been laid down differently in different books, owing to the *drawer* of a bill of exchange being confounded with the *maker* of a promissory note. Vide 1 *Ld. Raym.* 443. *Caf. Temp. Hardw.* p. 322. 2 *Burr.* 677. The distinction subsisting between them is thus clearly and satisfactorily laid down by Lord *Mansfield*, by whom the law upon the subject now seems to be settled. "The law is exactly the same, and fully settled upon the analogy of *promissory notes* to bills of exchange; which is very clear when the *point of resemblance* is once fixed. While a promissory note continues in its *original* shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is *indorsed*, the *resemblance* begins; for then it is an *order* by the indorser, upon the *maker* of the note, (*his debtor* by the note) to pay to the indorsee. This is the very definition of a bill of ex-

change. The indorser is the drawer; the maker of the note is the acceptor; and the indorsee is the person to whom it is made payable. The indorser only undertakes, in *case* the maker of the note does not pay. The indorsee is bound to *apply to the maker* of the note; he takes it *upon that condition*; and therefore must, in all cases, know who he is, and where he lives; and if, after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money, and cannot come upon the indorser at all. Therefore, before the indorsee of a *promissory note* brings an action against the indorser, he must shew a demand, or due diligence to get the money from the *maker* of the note; just as the person to whom the bill of exchange is made payable must shew a demand, or due diligence to get the money from the *acceptor*, before he brings an action against the *drawer*." 2 *Burr.* p. 676.

This point respecting the indorsee of a promissory note received a similar determination in the case of *Syderbottom* vers. *Smith*. 1 *Str.* p. 649. and in the case of *Collins v. Butler*, 2 *Str.* p. 1087.

ANONYMOUS. must be intended to the sheriffs of *London*, and then the sheriff of *Oxford* had no authority to return the jury.

But by the Court the award was amended, for by the statute 8 H. 6. c. 15. a letter too little or too much is amendable, and an award of the Court may be amended.

[581] So *Vicomiti Lond. Precipimus tibi*, instead of *Vicecomitibus Lond. Precipimus vobis*, was amended.

Cafe 253. Green and Bridget his Wife, Relict of Thomas Dobson, *vers.* Roe. In C. B.

In dower the plea of *lessee* for years ought not to be received after plea and judgment for the demandant.

IN dower, the defendant ~~pleaded~~ that *Tho. Dobson* was seised in fee, and made a lease to *John Caudle*, but did not shew when seised in fee, or that the term was assigned to him; so it might be after coverture.

Vide 2 Ld.
Raym. 1293.

After judgment for the demandant, *John Caudle*, claiming by lease for years from *Thomas Dobson*, father of the demandant, prayed to be received.

(a) St. & Edw.
c. c. 11h

Serjeant *Prime* insisted, that judgment for seisin ousted the lessee, and he could not falsify the judgment till aided by the statute of *Glo. c. 11. (a)* which extended only to recovery by default on collusion.

But this was helped generally by the stat. 21 H. 8. c. 15. *Vide Cro. El. 564. Noy, 65. S.C. 3 Leon 168. Winch 80. 1 Lilly's Præss. Reg. 669. Termor was received. 1 Salt. 291.*

The writ of seisin requires delivery of actual possession, so doestlivery, and consequently the lessee will be ousted.

Serjeant *Draper, contra.* First, This is not a case within the statute of *Glo. 11.* which extends only where judgment is by default, or on render, or *Nient dedire*, 2 *Inft.* 323. and not to seint pleader.

Then the statute 21 H. 8. c. 15. only enables the termor to falsify, as lessee for life might after judgment, which shews that it must be after judgment; and tenant for life after recovery may falsify by entry, by action, or by writ of disceit. *F. N. B.* 97. c.

GREEN v.
ROB.

Secondly, the stat. 21 H. 8. c. 15. enables to falsify only after judgment; the cases *Cro. Eliz.* &c. were on judgments by default, which was by virtue of stat. *Glo.* 11.

[582]

Thirdly, This is a dilatory plea, 2 *Inst.* 322. and therefore not to be received by the statute 4 & 5 Ann. c. 16. s. 10. It is in the nature of a plea after *Darrein continuance*, and a party can have but one such.

BALL. NI. PRI.
312.

Fourthly, The plea ought not to be received without an Affidavit to verify it; for tenant in dower cannot counterplead, nor can he shew lessee paid. 2 *Roll. Ab.* 444. s. 6, 7.

The Court. No receipt could be by common law; by the stat. *Glo.* receipt of lessee is allowed only on judgment by default; but here was a plea, and judgment for the demandant, only staid by the Court till this matter was considered.

By the stat. 21 H. 8. c. 15. the remedy given is after judgment, and the termor is enabled to falsify, as lessee could do so, which was not by receipt, for he might falsify the recovery.

But this is not properly a dilatory plea; so the lessee was not admitted to be received.

Case 254. Cockerel *vers.* Armstrong & *al.* In C. B.

Where interest
is in land, or
claimed out of
it, the plaintiff
cannot reply *de*
injuriâ suâ propriâ, but ought to traverse the right.

THIS was an action of trespass for taking and impounding a gelding at *Scarborough*.

The defendants plead, that the place where the gelding was taken is called *Weaponess*, containing 1000 acres in *Scarborough*, of which the bailiff and burgesses of *Scarborough* were seised in fee, and that the defendants as their servants, and by their command, took the cattle damage-feasant.

To which the plaintiff replies *de injuriâ suâ propriâ* generally.

To which the defendants demur, and shew for cause, that the plaintiff did not traverse.

And judgment was given for the defendants.

First, Because several things are put in issue; which is a reason in *Crogate's* case, 8 Co. 67. b.

Old Bendl. 198.

Cro. Eliz. 539.
212.

Cro. Jac. 225.

599. 1 Lev. 307. 2 Saund. 294. S. C. 2 Show. 310. 1 Ld. Raym. 640. 2 Ld. Raym. 1483.

Secondly, Because where interest is in land, or claimed out of land, the plaintiff cannot reply *de injuriâ suâ propriâ*. (1)

(1) The present case falls not only within the reason, but within the words of *Crogate's* case; where "it was resolved, that when the defendant in his own right, or as a servant to another, claims any interest in the land, or any common, or rent going out of the land, or any way or passage upon the land, &c. there *de injuriâ suâ propriâ* generally is no plea. 8 Co. 67.

Sir Archibald Grant *vers.* J. Gordon Armiger. Cafe 255.

In Scacc. Hil. 8 Geo. II. Rot. —

THIS was an action of debt on a bond dated the 11th of November 1730. in the penalty of 12,000 *l.*; the defendant after oyer of the bond and condition, which was to pay 6963 *l.* 3 *s.* 3 *d.* on the 15th of May next, pleads, that before the making of the said writing, *viz.* on the 11th of November 1730. William Gordon, Bart. was indebted to the plaintiff in the sum of 6963 *l.* 3 *s.* 3 *d.* and Sir Archibald Grant the plaintiff was indebted to the said Sir William Gordon (co-obligor in the said bond with the defendant, who was his son) in the sum of 500 *l.* received to his use; and being so indebted *eodem die* it was corruptly agreed contrary to the statute (a) of usury, that the plaintiff should forbear and give day of payment for the said 6963 *l.* 3 *s.* 3 *d.* till the 15th of May following 1731, and that for such forbearance the plaintiff, without any payment, satisfaction or account, should have and retain to his own use the said 500 *l.* then due, and Sir William should discharge him thereof; and for securing payment of the said 6963 *l.* 3 *s.* 3 *d.* Sir William and the defendant should give the said bond; and that in pursuance of such corrupt agreement the plaintiff gave day for payment of the 6963 *l.* 3 *s.* 3 *d.* till the 15th of May, and Sir William and his son the defendant did execute the said bond, and Sir William discharged the 500 *l.* giving a receipt acknowledging the payment of it, and discharging him from it, which without any payment, satisfaction or account, the plaintiff still retains to his own use, which sum of 500 *l.* exceeds the rate of 5 *l.* *per cent. per ann.*

Defendant being indebted to the plaintiff in the sum of 7000 *l.* and plaintiff being indebted to defendant in 500 *l.* it was agreed between them that in consideration plaintiff would forbear and give day of payment for the 7000 *l.* for six months following, defendant would give a receipt and discharge for the 500 *l.* The Court determined that it was not an usurious contract (a) 12 Ann. St. s. c. 16.

[584]

The plaintiff by his replication traverses the corrupt agreement, and issue is joined thereon; and at a trial before Chief Baron Reynolds, on the 27th of January 173— the jury found specially, that before the making of the said writing, *viz.* on the 11th of November 1730. Sir William was in-

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GORDON.

debted to the plaintiff in 6963 *l.* 3 *s.* 3 *d.* and the plaintiff to him in 500 *l.* for money received to his use; and being so indebted, it was agreed between the plaintiff and Sir *William*, that the plaintiff should give day for payment of the said 6963 *l.* 3 *s.* 3 *d.* till the 15th of *May* next, and for forbearing the said sum for the time, and till the day last mentioned, the plaintiff, without payment, satisfaction or account, should have and retain the said 500 *l.* to his own use, and Sir *William* should discharge him from it; and that for securing the said 6963 *l.* 3 *s.* 3 *d.* Sir *William* and the defendant should give a bond in the penalty of 12,000 *l.* with a condition *ut supra*, and at the same time Sir *William* should assign to the plaintiff a mortgage of lands in *Kent*, and two *Scotch* bonds, as a farther collateral security for the same sum; that in performance of the said agreement the plaintiff gave such day of payment, and retained to his own use the said 500 *l.* and without payment, and the said Sir *William* discharged him of it, and gave him a receipt for it; and for securing the 6963 *l.* 3 *s.* 3 *d.* Sir *William* and the defendant executed the writing in the declaration, and Sir *William* assigned the said mortgage and two *Scotch* bonds as a farther collateral security, and that the said 500 *l.* is above the rate of 5 *l.* per cent per annum; but whether on the said matter it was corruptly agreed *prout*, they reserve to the Court, &c.

[585] Upon this special verdict; it was insisted that this verdict was for the plaintiff. For,

First, The jury do not find the same contract which was pleaded.

Secondly, The contract as found is not usurious.

As to the first point, it was argued, that the contract found is variant from the contract pleaded, which saith, that the defendant in performance of his corrupt agreement agreed to give the bond on which the action is brought; the jury find, that he agreed to give that and three other securities, *viz.* an assignment of a mortgage and two *Scotch* bonds. The contract
is

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is intire, and the whole ought to have been shewn, that the Court may judge of it, and that a recovery or bar in this action may be pleaded to another action which may be brought on the bonds assigned.

If the plaintiff declares in debt on contract for the sale of a horse for 40*s.* and the jury find that the contract was for the sale of two horses for 40*s.* it is a different contract. 2 *Rol. Abr.* 702. So in debt for 20*l.* if the jury find debt for 40*l.* or two marks. 2 *Rol. Abr.* 702. So in *Assumpsit* for two things, if the jury find the undertaking was only to do one of them. 2. *Rol.* 703. So if an usurious contract is pleaded with one, and the jury find that it was entered into with two; to which it was answered, *Modo & formâ* goes to the substance of the plea only. *Co. Lit.* 281.

As to the second point; it was insisted that the contract found is not usurious; for first, it is not found for what time the forbearance was, but only till the 15th of *May*; and though the agreement is made on the 11th of *November*, yet the money being due before, it might be from a distant time before the time alledged; being after a verdict does not ascertain any thing.

If an agreement appears not to the Court usurious, the Court will not construe it to be such. 2 *Cro.* 507.

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2 Burr. 891.

If by mistake the money is agreed to be paid the day after, it shall not be void. 2 *Cro.* 677. *Cro. Car.* 501. 1 *Sid.* 285. *Vide* 3 *Mod.* 35.

It is but discharging a debt, which is a chose in action, and might never be paid; and the statute saith, reserving or taking above 5*l. per cent.*; here is no loan, and there is a difference between *interesse lucri*, and *interesse damni*. *Vide* 1 *Lut.* 274. *Comb.* 133. 1 *Sid.* 421. And afterwards in *Trinity Term* 1738. *Reynolds* Chief Baron, *Carter* and *Fortescue* Barons. *contra Thomson* Baron gave judgment for the plaintiff.

D E

Term. Sanct. Mich.

11 Geo. II.

Before the Commencement of this Term, on the Seventh Day of July, A. D. 1738. I received Letters Patent from the King appointing me Chief Baron of the Exchequer.

Cafe 256. Speed, and Sarah his Wife, Administratrix of Anderson her former Husband, *verf.* Martin.
In Scacc.

Where there is a single witness against the defendant's oath, this is not sufficient evidence for a decree.

THIS was a bill to have a note of 30*l.* given by *Anderson* to the defendant, delivered up, and an injunction to stop the defendant's proceeding at law, and in the Spiritual Court.

The case was this:

Anderson the intestate borrowed of the defendant at several times 70*l.* for which he gave a note for 40*l.* dated in *May* 1732. and a note for 30*l.* dated in *May* 1735. On the 23rd of *July* 1735. an account was settled, and 20*l.* having been before paid and indorsed on the 30*l.* note, the plaintiffs insist that *Anderson* then paid 55*l.* more, in full of principal and interest on both notes, and the 40*l.* note was delivered up, and the defendant not having the 30*l.* note then with him, he promised to deliver it as soon as it was found, and gave a receipt for 55*l.* in full of both notes, and all demands. But *Anderson* dying on the 20th of *July* following,

the

the defendant puts the 30/. note in suit, and then stopping that suit proceeds in the Spiritual Court to obtain administration as principal creditor.

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By his answer the defendant swears that on the 23d of July he received only 44/. in satisfaction of the 40/. note and interest, which was delivered up; and proves by one witness that *Anderson* said a few days before his death, that 11/. or 12/. was still due to him; on which it was insisted for the defendant, that the plaintiff's bill ought to be dismissed, since the defendant had denied the equity of the bill, and the plaintiff had not proved the payment of 55/. save by one witness, his servant, who swore that he saw the 55/. paid, and the receipt produced was read over to him, and he set his mark to it. And one witness is not sufficient to found a decree against the defendant's oath.

It was insisted for the plaintiff, that the bill was proper since the defendant was vexatious, having begun a suit on which the matter might be tried, and then suing in the Ecclesiastical Court; and bills for peace were usual, and to have bonds or notes delivered up that were satisfied; and here besides the one witness who is positive, there is the defendant's receipt under his hand, which he denies only as he remembers and believes; and as to *Anderson's* declaring that 11 or 12/. was due, we can prove his declaration to the contrary.

Per Cur. *Anderson's* declaring he owed nothing is no evidence, for he cannot take advantage of his own declaration; and one declaration that he did owe money, is of more avail than twenty declarations to the contrary; that the bill was not improper, since the defendant would not proceed in the action wherein the fact might be tried, but affected to get the administration to himself. Let therefore the bill be retained; but in case the defendant is willing to try whether the 10/. is due, or not, he shall have liberty to do it, since there is but one witness in effect against his oath; he is positive that *Anderson* paid but 44/. the witness is as positive that he paid

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551. Let that be tried before the end of next term, and the bill retained till that time, and in the mean time an injunction to stop the proceedings at law and in the Ecclesiastical Court.

Proc. in Ch. 19.
1 Vern. 137.
161.
2 Ch. Caf. 8.
3 Ch. Caf. 123.

Vide 2 Vern. 283. *Christ's College in Cambridge versus Wid-drington*; on an hearing on the 25th of February 1692. before *Rawlinson* and *Hutchins*, Lords Commissioners, the cause was referred to an account, and as to one article of the account there was but one witness against the defendant's oath. *Et per cur.* It was not sufficient evidence to decree against the defendant. And the plaintiff having had the benefit of a discovery on the defendant's oath, we will not send it to be tried at law, where one witness is sufficient, though insisted on by the defendant's counsel that it might be tried at law. (1)

Note. This was only in respect to one article on the account before the Master; and the plaintiff had before the benefit of the decree, an account and discovery from the defendant.

(1) In the case of *Walton* vers. *Hobbs*, reported in 2 Atk. 19. it is laid down that "Where there is a single deposition only, against the oath of a defendant in his answer, and the facts denied in the answer are equally strong with those that are affirmed by the deposition, there the rule, that you can have no decree upon such single evi-

dence against the defendant will hold; but where there are a great many concurring circumstances that strengthen and support the deposition of this witness, it does not come within the aforementioned rule." The same point was determined in the case of *Tanfon* vers. *Rany*. 2 Atk. 140. and in the case of *Only* vers. *Walker*, 3 Atk. 408.

Cafe 257.

Harrison vers. *Ridley & al.* In Scacc.

4 Nov. 1739.
A bill of revivor
lies not by an
assignee.
2 Eq. Abr. 3. pl.
8. S. C.
1 Vern. 283.
426.

THIS was a bill of revivor by the plaintiff, assignee of the Clerk of the Peace, to whom the effects of one *Bowman*, discharged as an insolvent debtor by virtue of the statute of 2 Geo. 2. c. 22. were assigned and transferred for the benefit of his creditors; *Bowman* had exhibited his bill in this Court to be relieved against securities entered into by him to the defendants; and the defendants having answered,

Bowman,

Bowman, who was a prisoner, was discharged by virtue of the statute for relieving insolvent debtors, and all his effects, pursuant to the direction of the act of parliament, transferred to the Clerk of the Peace for the county of *Middlesex*, who made an assignment of them to the plaintiff, who thereupon brought a bill of revivor to revive the proceedings in the original suit brought by *Bowman*; and the defendants, as to so much of the said bill as desired to revive these proceedings, demurred; and it was insisted for the defendant that the plaintiff could not revive, there being no privity between *Bowman* and him, and it was the constant course that the assignee or devisee could not revive, but must proceed by original bill, which was indeed in the nature of a bill of revivor. It is plain that he could not do so, unless he could do it by virtue of the statute; but the statute, *f. 9.* vested the property of *Bowman's* effects as fully as in the assignees of a commission of bankrupts. But the assignees of a commission of bankrupts could not bring a bill of revivor, but must sue by an original bill, which was daily experience. And of that opinion was the Court, and the demurrer allowed.

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It was likewise objected against the bill of revivor, because such bill can only revive the former proceeding; but here was new matter of fact, which required a new answer and examination, and therefore it was improper to have it inserted in a bill of revivor. But as to this the Court gave no opinion; and possibly if the plaintiff is entitled to have a bill of revivor, it will be necessary that he should insert so much new matter as is needful to shew how he comes intitled to revive.

Case 258. Joseph Milles *vers.* Mat. Davies, Evan Watts,
and Selby Price, *alias* Rees. In Scacc.

The sheriff may justify by grant of a replevin, without shewing the property of the goods to be in the plaintiff in replevin.

THIS was an action of trespass for taking two bullocks, &c. of the plaintiff. The defendant, as to all but the taking of the said bullocks, pleads Not Guilty; and as to the taking of them he justifies, for that before the taking, the other defendant *Evan Watts* came before him, then sheriff *Com. Radnor*, and made his complaint against the plaintiff in a plea of taking and unjustly detaining the cattle, and found pledges to prosecute the said plaint, and to return the cattle, if a return should be adjudged, and prayed a warrant to replevy the same. Whereupon he made his precept to the other defendant, *Selby Price*, his special bailiff, to replevy the same; and an attachment to the plaintiff to appear at the next County Court to answer the said *Evan Watts* in the said plea. Which precept, before the return and before the taking, he delivered to the said *S. Price*, who by virtue of it, at the time and place mentioned in the declaration, took the cattle, and the plaintiff not claiming property, delivered them to the defendant, and summoned the plaintiff to appear at the next County Court, to answer *Watts* in the said plea, for taking and distraining his cattle, and then returned his precept executed as aforesaid; he being sheriff at the taking and at the return of the precept; which is the same taking, &c.

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The defendant *Evan Watts* pleads Not Guilty generally.

The defendant *Selby Price*, as to all but the taking, pleads Not Guilty, and as to that justifies by virtue of the precept *ut supra*.

The plaintiff demurs to both pleas, and shews for cause, That the defendants do not alledge that the cattle were the proper cattle of the said *Evan Watts*, or that he claimed property or title to them, or that they were in his possession, or shewn by him to the sheriff or bailiff, or were distrained by the plaintiff out of his possession.

Secondly,

Secondly, That the plea doth not mention what pledges by name were found.

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Others.

Thirdly, That it is not alledged that the plaintiff had notice of the plaint or replevin.

Fourthly, That the plea amounts to the general issue.

The defendants join in demurrer.

As to the first cause of demurrer; the defendants, who justify, are officers, who cannot know in whom the property of the cattle is. By the stat. *Marl. 52 Hen. 3. c. 21. Si averia capiant vicecomes post querimoniam sibi fact. deliberare possit*; and therefore it is agreed, that it becomes the sheriff's duty upon such complaint, by parol, or by precept to his bailiff, to replevy them. *Per Litt. 9 Ed. 4. 48. b. F. N. B. 69. E. 2 Inst. 139.* And such precept may be given before any county-court. *Co. Lit. 145. b.* It is true, such plaint ought afterwards to be entered; but who is to enter it? He that makes the complaint, not the sheriff; if then the plaintiff does not enter it, shall his neglect subject the sheriff to an action? The sheriff might lawfully make such precept before the plaint entered; suppose he does so, and the party, from whom the cattle are taken, before the next county-court brings his action, shall the sheriff be liable for doing what he lawfully might and ought to do?

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In case the person from whom the cattle are taken hath property, the law gives him a proper remedy; if he claim property before the sheriff, he must return it, and on such return a writ *De proprietate probanda* issues; and if found for the claimant the sheriff can proceed no further. *Co. Litt. 145. b. Dyer 173.* But if the (1) plaintiff had property, and omitted to claim it before the sheriff, he might plead property in himself or in a stranger, either in abatement or in bar. *2 H. 6. 14. 9 H. 6. 39. b. 39 H. 6. 35. a. R.*

Fitz. N. B. 3th.
edit. p. 177.
n. (u)
Gilb. Replev.
2d. edit. p. 98.
In replevin the
defendant may
plead property
in himself or in
a stranger, either
in bar or in
abatement.
Gilb. Replev.
p. 127.
Supra p. 247i

(1) The plaintiff in the present action is intended by the text, who would be the defendant in the action of replevin, and might as such plead property in himself, or a stranger, either in bar or in abatement.

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(a) 2 Ld. Raym.
924. 6 Mod. 81.

Cro. El. 475. 1 *Salk.* (a) 5. 94. (b) and many other books.

(b) *Carth.* 243. 1 *Show.* 400. S. C. 2 Ld. Raym. 1017.

Now here the plea expressly saith, that the plaintiff claimed no property before the sheriff, and that he was summoned to answer the other defendant *Evan Watts* in a plea of taking and detaining his cattle, whereby although he did not make his claim before the sheriff, he might have appeared and insisted on it by his plea.

As to what is said, that the sheriff doth not shew by his plea, that the defendant *Evan Watts* was possessed of the cattle, or had distrained them; the sheriff had no authority, and consequently no cause to inquire into the defendant's right or title to the cattle; if the plaintiff had claimed property, he could not have determined it without a writ of *Proprietate probandâ*, and upon such a writ, if it had appeared that the said *Watts* had no property, though he had possession, he could not have replevied the cattle.

[593.] As to the second cause of demurrer, that the plea doth not alledge what pledges are found, and who by name. It is true, in replevin by writ the sheriff must take pledges, and those pledges are liable; for if a return be adjudged, and the cattle not returned, a *Scire Facias* lies against the pledges; and if the sheriff returns *Nihil*, a writ shall be sued out against him to answer the value of the cattle. 2 *Inst.* 340. And therefore if the sheriff doth not take pledges in replevin by writ, it is error. Resolved *Cro. Car.* 594. And an action on the case lies against him for his default. Resolved *Cro. Car.* 446. And therefore in such a case there might be a reason why the sheriff should shew what pledges he hath taken. But in a replevin by plaint the sheriff is not bound to take pledges. (2) Resolved *Cro. Car.* 594. And there-

(2) It is laid down in Gilbert's that, "Whether the replevin be by Law of Replevins, 2d. edit. p. 67. plaint or writ, the sheriff, before he grants

therefore his omission to take them is not error. Resolved 1 Jon. 439. (a) Yet if the sheriff doth take pledges, a *Scire Facias* lies against them, if the cattle be not returned. Resolved 3 Mod. 56. (b) Resolved in C. B. H. 3 Geo. inter *Mulso* and *Shere*. (c) But whether the sheriff was obliged to take pledges or not, what need hath the defendant to set forth the names of the pledges in his plea? for the defendant only justifies the taking of the cattle, which the plaintiff claims to be his, because he was sheriff of the county of *Radnor*, and as such was bound to give replevins *super querimon' sibi fact'*, and he did so accordingly; and being required by the stat. W. 2. to take pledges on granting such replevin to make return as well as to prosecute, he saith that he did so, whereby the plaintiff was secure of having his cattle again if a return should be adjudged; but who those pledges were is not at present material, since here appears as yet no cause why a *Scire Facias* should be awarded against them.

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(a) March. 46.
S. C.
(b) Skinn. 244.
Comb. 1.
3 Show. 481.
485. S. C.
(c) Fort. 330.

As to the third cause of demurrer, it is expressly said by the plea, that the precept required the officer to summon the plaintiff to appear and answer the other defendant *Evans Watts* at the next county-court in a plea of taking and detaining his cattle, and that *Selby Price* the officer summoned him accordingly; What other notice should the sheriff give of such plaint or replevin?

As to the fourth cause of demurrer, that the plea amounts to the general issue, it does not appear but that the plaintiff may have the property of the cattle for which this action is

grants the one or executes the other, ought to take from the plaintiff pledges *de pros'*, and pledges *de retorno habendo*. The first was at common law, to answer the amerciaments to the King *pro falso clamore*, in case the plaintiff did not prevail in his suit. The other pledges were introduced by the stat. Westm. 2. c. 2. for the security of

the avowant, in case he should have judgment for return of the beasts." The omission of the pledges of the first description is error; but the omission of pledges *de retorno habendo*, does not vitiate the proceedings, but subjects the sheriff to an action. 1 Jon. 439. Cro. Car. 594.

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now brought. It is admitted, that the plaintiff had the possession of them, and that upon the defendant *Davis* his command they were taken out of his possession by the other defendant *Price*, and consequently if they had pleaded Not guilty, the plaintiff must recover; for it had been sufficient for him to prove that the plaintiff had the cattle in his possession, and the defendant took them, unless the defendants could shew some matter to justify or excuse the taking; but such justification or excuse must be pleaded, and could not be given in evidence upon Not guilty.

(a) 1 Ld. Raym.
218.
3 Salk. 272.
Carb. 380.
5 Mod. 252.
12 Mod. 120.
Skin. 674.
S. C.

In the case of *Hallet v. Birt*, *Pasch.* 9 W. 3. in B. R. 1 Salk. (a) 394. which was trespass for a horse, the defendant pleaded that the Bishop of *Sarum* had a right to grant replevins in such a manor; that the horse was *A's*, that the plaintiff impounded him, and that the defendant took him by virtue of a replevin; it was holden very rightly, that the plea amounted to the general issue, for the plea admits no property or possession in the plaintiff, who consequently had no colour of action; for by the plaintiff's taking and impounding the horse, the horse was not in his possession, but in the custody of the law, and consequently no justification was needful.

If it is said that the plea admits property in the plaintiff, and that then the cattle could not be taken from him by a replevin without shewing some cause for it, it is tantamount, as to say, that the sheriff ought not to grant a replevin, unless the party praying it hath just ground of action. But what authority is to examine into or determine that point? If the party who hath the cattle claims property, the sheriff cannot determine it without a writ *de proprietate probandâ*; and then if the property be found for the party claiming it, it is but an inquest of office, and the party who made the plaint may afterwards sue a writ of replevin, to which property may be again pleaded. 7 H. 4. 46. a. Co. Lit. 145. b.

And this appears, by the case of *Meres v. Solebay*, *Trim.* 29 Car. 2. in C. B. 2 Mod. 242. which was trover for taking

taking plaintiff's sheep; the Jury found that *A.* agreed to depasture his sheep for some time with *B.* and then if *B.* would give such a price he should have them before the time; *A.* sells them to the plaintiff, *B.* afterwards sells them to *C.* who brought a replevin for them, and the defendant, his servant, in assistance of the sheriff's officer, drove them to his master's ground, and though the plaintiff demanded them, refused to deliver them. And though the court held that the property was in the plaintiff, yet they gave judgment for the defendant, for he entered in execution of the legal process, which is a justification to him as well as to the officers.

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These things occurred on reading the paper-book, but it was again argued by Serjeant *Draper* for the plaintiff, and Mr. *Boole* for the defendant.

Serjeant *Draper* insisted, that the plea was ill, for it ought to have shewn that *Watts* who sued the replevin had property in the goods replevied; for although the defendant *Davis* be an officer, he ought to shew that he had authority to take the goods, and that his authority was duly executed; now his authority is by the stat. *Marlb.* which requires *si averia alicujus capiant' & injuste detineantur vicecomes redeliberare possit*; so there must be a person whose cattle are taken, there must be an unlawful taking, otherwise the sheriff hath no authority. *Watts* appears not to have any right to the cattle, or that he so much as claimed the property of them; the plea should say that they were *Averia sua*; so it was in *Hallet and Birt's case*, *Carth.* 380. 5 *Mod.* 248. 252. though the Court indeed gave no judgment as to that point. So *Reg.* 81. Therefore in trespass, a replevin pending for the same trespass is a good plea. *Bro. Tit. Tresp.* 48. 251, 252. 271.

Secondly, The party ought to shew the cattle to the sheriff, till when he is not bound to replevy them; for it is a good return *Quod nullus venit ex parte quer' ad monstrand' averia.* *Dat. Sher.* 277. *Kelw.* 119. b. So the sheriff should not return till the *Plurisi*, till then he is excused,

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Others.

The writ *de proprietate probanda* lies not by a stranger.
Dalt. Sher. 435.

cused, on the *Pluries* he may return the claim of property, till such return the writ *de proprietate probanda* lies not, for it recites the *Pluries*. Reg. 83. a. 85. b. and such writ must be brought by the plaintiff in the suit, for it cannot be by a stranger. Co. Lit. 145. b. 2 Rol. Abr. 431. 14 H. 4. 25.

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If the sheriff be shewn a stranger's goods, and takes them, trespass lies against him. (3) 2 Rol. 552. And otherwise a stranger could have no remedy, though all his goods were taken away; and it would be the most mischievous thing possible, for the sheriff might strip a man's house, and he would have no remedy; he cannot have *proprietate probanda*, because a stranger, nor does it lie on replevin by plaintiff. Fitz. Proprietate probanda, fol. 26. Dalt. Sher. 436. Reg. 83. Th. Br. 170.

Thirdly, The defendant ought to have shewn when the county-court was holden; for otherwise how could the plaintiff, against whom the plaintiff was sued, know when or where to appear?

In inferior courts it is not enough to say, that the party is adjourned to the next Court, unless it be likewise shewn at what time and before whom such Court is to be holden.

In answer to which it was argued, that it lay not in the knowledge of the sheriff in whom the right of the cattle replevied was; and if he should say that the property of the goods did belong to *Evan Watts*, it would make the plea amount to the general issue, as was holden in the case of *Dale* and *Philipson*, 2 Lutw. 1372.

(3) Lord Holt, in the case of *Hallet v. Birt* reported by Carthew, declares that "no action of trespass will lie against the officers for taking goods or cattle by virtue of a replevin, unless he who had the possession claimed a

property when the officers came to demand them, and they took them notwithstanding such claim of property; and that such special matter must come in by way of replication by the plaintiff." P. 381.

Upon

Upon which the Court inclined to think that the plea was good notwithstanding the objections insisted on; but as many cases had been cited by the counsel, time was taken to consider them to a further day in the same term, when I delivered the judgment of the Court for the defendants.

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Others.

Term. Sanct. Hill.

11 Geo. II.

Cafe 259. Roe *vers.* Sir John More, Bart. In the Exchequer-Chamber.
28 January.

Error in fact is not assignable in the Exchequer-Chamber.

THIS was error of a judgment in the Court of King's Bench, in an action of *Assumpsit* for 40*l.* for the occupation of an house, and for lodgings and necessaries found by the plaintiff for the defendant and his servants. On *Non Assumpsit* pleaded, the Jury found for the plaintiff, and gave 8*l.* damages; and judgment was given for the plaintiff.

On the 11th of *February*, 11 Geo. 2. which was in *Hil.* Term following, the plaintiff in error comes in his proper person before the Justices of the Court of Common Pleas, and the Barons of the Exchequer, and assigns for error, That it appears by the record, that in *Easter* Term 10 Geo. 2. he defended and pleaded to issue in the Court of King's Bench by *Richard Ednel* his attorney, whereas he was then an infant under the age of twenty-one years.

The defendant in error pleads *In nullo est erratum*, and prays that the judgment may be affirmed.

Where defendant, being an infant, appears by attorney it is error.
2 Saund. 212.
Com. Dig. Tit. *Plader*. (2 C. 2.)

In this case it was agreed, that it was error for an infant to appear by attorney, for he ought to appear by guardian. But the question in this case was, whether this being an error in fact was assignable for error in the Exchequer-

chequer-Chamber, which sat only by virtue of the statute *Rox v. Moor.*
27 Eliz. c. 8.

And it was insisted by Mr. *Robinson* that it was; and so [598]
it was resolved *Cro. El.* 731. and so again 2 *Cro.* 5. where
all the Justices and Barons agreed, (except *Anderson Ch. J.*)
that it might be assigned; and the defendant pleading that
he was at full age, a *Nisi Prius* was awarded under the Ex-
chequer-Seal, and the Chief Justice refused to seal it, on
which issue the Jury found for the plaintiff in error, upon
which the judgment was reversed. It is true, when the
record was remanded, it was moved in the Court of King's
Bench, that they had proceeded in the Exchequer-Chamber
without warrant of the statute to try error *in fact*, for the
statute impowers them only to try errors in the record; and
of that opinion were all the Justices. But it is not strange
that the Justices of the Court of King's Bench, whose judg-
ment was reversed, should determine against the jurisdic-
tion of the Court that reversed it. These cases were *M.*
41 & 42 *El.*; the first was *Price's* case, wherein the death of
the party before judgment was assigned; the other was,
that of *Reu v. Long*, wherein the error assigned was, that
the plaintiff being an infant sued by attorney, when he ought
to have sued by guardian or *Prochein Amy*, (which at that
time was error, though it be since helped by the statute
21 *Jac.* c. 13. after a verdict.)

But afterwards the same error was assigned, that one of
the defendants appeared by attorney being under age, upon
a writ of error in the Exchequer-Chamber of a judgment
in the Court of King's Bench, and the judgment was re-
versed. 2 *Cro.* 303. *King* vers. *Marborough* and *Craker*,

So in error of a judgment in the Court of King's Bench,
in an action of ejectment, it was assigned for error, that
the lessor was seised in right of his wife, who died before
judgment; although the death of one, who was no party
to the suit, was holden no error, yet it was agreed in the
Exchequer-Chamber, that judgment might be reversed for

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matters of fact, as the death of the party, or the like, where the writ was absolutely abated. *Hob. 5. Wilkes and Jordan, P. 9 Jac.*

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So in the case *Cro. Car. 513. 1 Jon. 410.* where the death of two of the defendants before verdict was assigned for error; it was moved, that this might be examined in the Court of King's Bench, but the Court held that it could not after judgment entered. Then it was considered, whether error in deed was assignable in the Exchequer-Chamber; because, as *Berkley* said, the statute gave power only to examine matters in law. But *Brampton* Ch. J. *Jones and Crook*, held that it was well assignable. And in the report notice is taken, that it was assigned in the case of *Rew* and *Long*, 2 *Cro. 5.* and tried by *Nisi Prius*; and the like was *H. 16 Jac. Rot. 75.* and the like *M. 10 Car. Smith and Merchant.*

Serjeant *Draper contra* insisted, That by the statute 27 *Eliz. c. 8.* the preamble recites, Forasmuch as erroneous judgments given in the Court of King's Bench, are only to be reformed by the High Court of Parliament, which Court is not so often holden as in antient times, neither in respect of the greater affairs such erroneous judgments can be well considered of and determined during the time of parliament; whereby subjects are greatly delayed of justice; therefore authority is given to the Judges of the Common Pleas and Barons of the Exchequer, to examine, and affirm or reverse the judgments of the King's Bench in the cases there enumerated; so that it is plain the statute intended to give a writ of error before the Justices and Barons only in cases where a writ of error lay before in parliament, and to prevent delay where the parliament was not frequently holden. As therefore the parliament (1) never examined into errors

(1) It is laid down in 1 *Ld. Raym. p. 15.* "that the House of Lords has no jurisdiction in an original cause, because that supreme court is the last resort. Besides, that for the most part original causes are mixed with mat-

ter of fact, and it is unworthy of so supreme a court, to try matters of fact, for which reason error of fact in B. R. must of necessity be brought before the same Judges of B. R."

in fact, nor had any method to try them, (for it was never known that the parliament ever issued process for the trial of any matter of fact) but only for errors appearing upon the record; so this statute gave the Justices and Barons authority only to examine and reform errors in and upon the record; nor was there any occasion for it; for errors in fact were before remediable, and still are by writ of error *Quod coram vobis refidet*. So that it seems an encroachment upon the jurisdiction of the Court of King's Bench, for the Exchequer-Chamber to examine and try matters of fact, which is expressly provided against by the statute, and by the exception in the writ of error, (other than such as are concerning the jurisdiction of the Court of King's Bench.)

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MONT.

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It is true, that this matter was not so fully considered at first, and therefore there was a variety of opinions among the Judges about it; and in *Price's case*, *Cro. El.* 731. it was holden that error in fact might be assigned, and tried; but yet they held that they could not bail, or do any thing but examine the errors, which must be the errors in the record before them.

So in the case 2 *Cro.* 5. though the Justices and Barons held such error assignable, and triable by them, yet *Anderfon* Chief Justice was of a different opinion, and so strongly so, that he would not suffer the seal in his custody to be made use of to seal the writ of *Nisi Prius*. And therefore it is no wonder that all the Justices of the Court of King's Bench declared against it, and refused to grant restitution to the defendant, against whom there was an execution; which could only be on this foundation, that the Exchequer-Chamber had no jurisdiction in the case, and then the proceeding before them was null and void, as being in this respect *Coram non iudice*.

The case *Hob.* 5. was only a bare admission of the Court, no judicial determination, for the judgment was not reversed; so in the case in *Cro. Car.* 513. for it came before the Court of King's Bench only upon a motion to amend the

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record, by varying the entry of the death of two of the defendants after the last continuance, and making it to be before the verdict; although it was confessed by the other party to be as the entry was; but the Court held that such amendment could not be made after judgment entered.

Then it was started, how it could be helped? For as *Berckley* said, it could not be assigned for error in the Exchequer-Chamber; the other Justices indeed on a sudden thought it might; but then when it came to be considered how it could be tried, they all doubted, and the matter was adjourned; and what became of it afterwards appears not.

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(a) 3 Keb. 28.
S. C.

But in the case of *Hopkins and Prior* vers. *Wrigglesworth*, 2 Lev. 38. (a) 1 Vent. 207. S. C. where in error in the Exchequer-Chamber of a judgment in the Court of King's Bench, in an action of trespass, the death of one of the defendants before judgment was assigned for error, and *In nullo est erratum* pleaded, which is a confession of the fact, yet the judgment was affirmed, for the Exchequer-Chamber hath nothing to do with errors in fact, which the Court of King's Bench might have examined before the statute; and therefore the statute extends to no cases but such wherein there was no remedy before but in parliament.

(b) 2 Jon. 81.
3 Salk. 249.
2 Lev. 184.
S. C.

So it was said in the case of *Ipsly and Turk*, that error in fact cannot be assigned in the Exchequer-Chamber. 2 Mod. (b) 194. That matter of form cannot be assigned, appears from 1 Sid. 253.

The cause being adjourned till the next term, Hil. 1738. all the Justices and Barons agreed that error in fact could not be assigned, nor was it examinable in the Exchequer-Chamber, that *In nullo est erratum* was in the nature of a demurrer to it, and that judgment ought to be affirmed; upon which it was moved that the plaintiff in error might discontinue his writ upon payment of costs, which was granted *Nisi Causa*, and afterwards made absolute; but afterwards

wards in *Easter* Term 1739, upon an Affidavit that the costs were taxed, and had been demanded, and that the plaintiff in error refused to pay them, the rule for discontinuing the writ of error was discharged; the cause was again put into the paper, and the judgment affirmed.

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Sir George Wynn *vers.* Bishop of Bangor. Case 260.
In Scacc.

IN an ejectment on the demise of Sir *George Wynn*, for a piece of land in which a lead mine was discovered, after a verdict for the plaintiff it was moved for a new trial on several Affidavits, shewing,

Where a new trial shall be granted for a misbehaviour in one of the jury.

First, That upon the view granted in this cause, *George Wynn*, who was one of the showers for the plaintiff, gave evidence to such of the jurors as were upon the view, by arguing against the likelihood that the places shewn on the part of the defendant as the limits of their land should be the boundaries, because the names they bore might be given for such and such particular reasons.

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Secondly, That one of the jurors declared at the view, that by what they had seen (before the shower for the defendant had shewn) they should soon determine the dispute.

1 Str. 643,

And afterwards, upon the day before the trial, he said Sir *Geo. Wynn* was a neighbour, and right or wrong he would give it for him; and for these reasons the Court granted a new trial, although Baron *Parker* seemed to think that the words being known before the trial, and for them a challenge might have been taken against the persons being on a jury, that such challenge being omitted, it was not proper to alledge the matter as a cause for a new trial, and the case of *Herbert v. Shaw* (a) was cited for that purpose.

(a) 11 Mod.
111. 113.

But the Chief Baron said that he was Counsel in that cause, which related to a fishery at *Milton*, claimed by the Lady *Catherine*

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GOR.

therine Herbert, who was grand-daughter to the Duke of *Leeds*, and after a verdict for the lady at the assizes at *Maidstone* it was moved for a new trial, because the Duke had sent letters to several of the jurors returned upon the panel, desiring them to appear at the assizes; but a new trial was denied, because the letter did not hint any thing more than a desire that they should be there, although the Chief Justice *Holt* expressed a dislike to such letters, which from a Peer of such eminence, might be thought to have some influence on the cause, though nothing was said about it. (1)

(1) It was determined in the case of *Snell v. Trimbrall*, 1 Str. 643. on a motion for a new trial, that desiring a juror to appear in his cause, was no ground to set aside the verdict.

Case 261.

Hodgson vers. Atkinson. In Scacc.

[603]

Custom or pre-
scriptions are
only triable at
common law.
2 Rol. Abr.
307.
Carth. 33.
1 Ld. Raym.
435.

A PROHIBITION was moved for to the Consistory Court of the Bishop of *Chester*, for that a libel was there exhibited, suggesting that by custom and constant usage the parishioners who had lands in the chapelry of the chapel of *Preston Patrick* in the diocese of *Chester*, or the major part of them, used to choose or nominate a curate to officiate in that chapelry, and to pay him out of their lands a salary or pension for so doing.

That *Atkinson* was duly elected by the major part of the parishioners to be curate there, and had entered a *Caveat* in the usual form against any other persons being admitted curate; that notwithstanding such *Caveat*, the Bishop granted a licence to *Hodgson* to officiate as curate there, although it did not appear that he was in holy orders, and upon a suggestion that they proceeded to examine this custom, (1) although customs

(1) " The reason (according to *Holt*, Chief Justice) why the spiritual court ought not to try customs is, because they have different notions of customs,

customs and prescriptions were triable only at common law, a rule was made for a prohibition, *nisi, &c.* And now upon shewing cause it was insisted, that this libel was not intended to examine or controvert the custom, but only to examine the validity of the licence to *Hodgson*, pending a *Caveat*, and where he was not in holy orders, of which they have the proper jurisdiction; which was admitted, and so a prohibition only *quoad* the trial of the custom. (2)

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ATKINSON.

customs, as to the time which creates them, from those that the common law hath. For in some cases the usage of ten years, in some twenty, in some thirty years, makes a custom in the spiritual court; whereas by the common law it must be time whereof, &c. And therefore, since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in

many cases the inheritances of persons may be bound." 1 Ld Raym. 435.

(2) "If a man libels for two distinct things, the one of which is of ecclesiastical cognisance, and the other not, a prohibition shall be granted, *quoad* that which is of temporal consequence, and they of the court (Christian) shall proceed for the other." 1 Ld Raym. 59. Moore, 873. Style, 10. 1 Sid. 251.

Croft *vers.* Powel & al. In Scacc.

Case 262.

THIS was a bill to redeem a mortgage made by *Rouse* to *Baldwin*, and by him assigned to *Gabriel Powel*, the father of *John Powel* the defendant; and upon the opening of the bill and answer, and reading the depositions, the case appeared to be this: *Robert Rouse* seised in fee of lands in *Com. Brecon* by lease and release, dated the 16th and the 17th of *January* 1703, conveyed them to *John Baldwin* and his heirs; and by a defeasance bearing date with the release, and executed at the same time, it was agreed that if *Rouse* should repay 1000*l.* borrowed of *Baldwin*, and likewise two other debts borrowed of other persons, and which *Baldwin* took upon him to pay off, amounting together to 2200*l.* within the space of one year from the date of the indenture, then

A. conveys lands to *B.* and his heirs by lease and release, and by a defeasance bearing date with the release agrees that if he pays 1000*l.* borrowed of *B.* within a year, that *B.* should reconvey to him; but if he failed to pay the money within the year, then *B.* should mortgage or absolutely sell the same lands free from redemption. The money not being paid at the

time, *B.* agreed to convey the estate to *C.* and in the agreement and conveyances an exception was made, and the defeasance was mentioned; and a question arising whether *C.* had an absolute estate, the Court determined that he had purchased an estate subject to a redemption by *A.*

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POWEL.

Baldwin should reconvey to him ; but if he failed to pay that money within the year, then *Baldwin* should mortgage or absolutely sell the same lands, free from redemption, and out of the money raised by such mortgage or sale pay the said 2200*l.* and interest, and be accountable for the overplus to *Robert Rouse* and his heirs.

That afterwards the said *John Rouse* borrowed several other sums of money, some of which were paid off by *Baldwin*, who took several assignments of their securities in trust for himself ; and in particular in the year 1710. he confessed a judgment for the sum of 578*l.* for securing a bond-debt of that penalty to *John Ridhouse*, to whom Sir *John Morgan* was administrator, with the will annexed, being his grandson ; and in 1712. made a mortgage to the plaintiff for securing 695*l.* which mortgage was made by lease and release, dated the 19th and the 20th of *April* 1709. but, upon a trial at law for that purpose, were found not to be executed till the 5th of *July* 1712.

By articles of agreement inter *John Baldwin* of the first part, *Richard Knights* of the second, and *Gabriel Powel* of the third part, dated — the said *John Baldwin* agrees for 4300*l.* to convey this estate to *Gabriel Powel* and his heirs, and to warrant the same to him and his heirs, except as therein after excepted ; and covenants that he had full power to convey, except as is excepted, and in such exception the said defeazance is mentioned.

And afterwards by indenture of lease and release, dated the 25th and the 26th of *March* 1716. *J. Baldwin* conveys to *Gabriel Powell* and his heirs, to the use of him and his heirs ; and in such conveyance the said defeazance is mentioned and excepted ; and *Baldwin* therein covenants, that the sum of 4400*l.* was then due to him upon the said mortgage ; and by *Henry Williams's* deposition it appears, that at the grand sessions at *Brecon* in *Wales*, anno 8 Ann. a fine was levied of the

the same lands and tenements by *Robert Rouse* and *Susan* his wife, to *John Baldwin* and his heirs, but the deed leading the uses of such fine does not appear; and that *R. Rouse*, was privy and consenting to the said agreement made by the articles aforesaid *inter John Baldwin* of the first, *Richard Knight* of the second, and *Gabriel Powel* of the third part, and that *Baldwin* being in possession presented to a benefice belonging to that estate when it became vacant.

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That in 1719. *Gabriel Powel* exhibited a bill in this Court against *Rouse* and his wife, and their daughter *Ja. Baldwin*, for incumbrances assigned, praying to be quieted in the possession of the said estate; or if the Court should decree his estate to be redeemable, that *Rouse*, &c. might redeem by a short day, or otherwise might be foreclosed.

Upon this *Rouse* exhibits a cross bill, praying to redeem; and *Gabriel Powel* by his answer to such cross bill insists, that *Rouse* having conveyed to *John Baldwin* and his heirs *ut supra*, by lease and release in 1708. and having borrowed more monies, and neglected to pay interest to *Baldwin* and others for two years, and the annual profits not answering the interest by 40*l. per annum*, in order to bar the wife's dower, without which he could not be able to meet purchasers, a fine *sur consuefance de droit* was levied at the great sessions in *Wales* 10 *Ann.* upon which *Baldwin* took upon himself to be absolute owner, and treated with several for the absolute sale of the premisses.

That after six years possession the defendant *Gabriel Powel* treated with *Baldwin* for the absolute purchase in *August* 1716. and agreed with him to purchase the estate for 4300 *l.* and entered into the articles *supra*, and took an assignment of a mortgage to *Knight*, and paid him 2200 *l.* and paid *Baldwin* 350 *l.* and agreed to pay him 1750 *l.* more; that while the agreement was writing he was shewn the defeasance, and *Baldwin* desired that it might be taken notice of in the articles; which was done, on his assuring him that 4400 *l.* was then due to him upon the said estate.

That

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That in *March* 1716. *Baldwin* conveyed to him and his heirs, by which he thought to have had an absolute estate; but *Baldwin* acting under the power in the defeasance, insisted to have it mentioned, and it was so; and he fearing that he might be accountable to *Rouse* for the overplus above what was due to *Baldwin*, made him covenant that 4400 *l.* was then due to him; that nine months after *Cotten* asked if he had paid all the money, and he confessed he had 1300 *l.* still in his hand, which *Cotten* advised him to keep, and not to pay, but by the direction of a Court of Equity, since *Rouse* had made over the overplus for the benefit of his wife and children, and shewed him a deed dated *November* 1709. to that effect; that on the said bill he offered to pay the 1300 *l.* which he had still in his hands; and submitted whether the plaintiff in the cross bill or *Baldwin* should redeem.

On this case it was insisted, that *Powel* had an absolute estate not redeemable; for the estate conveyed to *Baldwin* was an absolute estate; and though there was a defeasance executed at the same time, yet that made the estate defeasable only in case the 2821 *l.* was paid within a twelvemonth; if not, he was invested with a power to sell absolutely, free from all equity of redemption; that then it became a trust in him to sell; and in case an estate be conveyed to trustees to sell, or devised to them to sell, for payment of debts and legacies, the vendee by virtue of such sale hath an absolute estate, free from all charges or power of redemption.

Perhaps *Rouse* might have redeemed from *Baldwin* even after the year; but when he had given him a power and authority to sell, in case the money was not paid within the year, he then became a trustee for that purpose, and his vendee will by his sale, in pursuance of his power and trust, have an absolute irredeemable estate. It may be resembled to the case of *Bonham* and *Newcomb*, (a) 2 Vent. 364, where a man conveyed an estate to another and his heirs, under a condition, that if the vendor paid him 1000 *l.* at any time during his life, he should suffer a recovery; but in case of failure of payment,

the

(a) *Infra*, p.
609.

the vendee should hold absolutely to him and his heirs, and his heirs should not redeem. Upon a bill preferred by the heir to redeem after the death of the vendor, it was holden that the estate was not redeemable; and this decree was afterwards affirmed in Parliament.

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Secondly, This case is the stronger, because *Baldwin* continued six years in possession as absolute owner before he sold to *Gabriel Powel*, and during that time he presented to a vacant benefice, which if he had been only mortgagee, he ought not to have presented to it, because it belongs to the mortgagor to present; then *Rouse* and his wife levied a fine to him, which passed their right in it to him, and made him an absolute estate; and how can he afterwards be able to redeem against his own fine? Besides, his consent was given to the conveyance to *Powel*.

Thirdly, Here have passed twenty years and more since the first mortgage made to *Baldwin*, and it is not usual to admit a redemption after a quiet possession for twenty years together.

Infra, p. 610.

And although it be objected, that *Gabriel Powel* had notice of the defeasance, and it was excepted in the conveyance and articles; that was but a prudent caution, as was likewise the covenant, that 4400 *l.* was due to *Baldwin* at the time of that conveyance, since *Baldwin* might possibly be accountable for the overplus, if he had sold for more than what was due to him.

But it was answered, and resolved by the Court, that the estate was redeemable; for the estate conveyed to *John Baldwin* and his heirs being defeasanced by a deed of the same date, was in its nature a mortgage to him; and therefore though the money was not paid within the year, yet the mortgagor might still redeem, upon payment of principal and interest, at any time while the estate continued in the hands of *Baldwin*.

Then though *Baldwin* had a power, upon the non-payment of the money within the year, to mortgage or sell in order to raise

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raise the money lent, and to be accountable for the overplus, it is not now to be considered what he might have done, but what he has done. And it is manifest, that it was not *Baldwin*'s intention to give *Gabriel Powell* an absolute and indefeasible estate, for it is not conveyed to him absolutely and free from the equity of redemption; but while the articles of agreement were writing, *Baldwin* shews to *Powell* the defeasance, and insists to have it mentioned in the articles; and when the conveyance was executed in pursuance of these articles, the covenant for enjoyment, and for his having power to convey, is with an exception, as therein mentioned, that is, subject to the defeasance.

And although *Powell* says in his answer, that he treated for the absolute purchase, yet it is evident, that when *Baldwin* insisted to have the defeasance inserted, he has it so, and insisted to have a covenant from *Baldwin*, that 4400*l.* was due to him, fearing, as he saith, that he should be accountable for the overplus to *Rouse*.

So that this is a very different case from a trustee, who is authorised by a will, &c. to sell for the payment of debts and legacies; there is no original mortgage, but the trust is directly to sell, and there is nobody to redeem, for as the trust was to sell absolutely, the purchaser cannot be subject to redemption, and the heir is at no prejudice, if the purchase money be more than will satisfy the debts and legacies, he will in equity be intitled to the overplus.

Nor can it well be conceived, if *Powell* had expected an absolute estate free from redemption by *Rouse*, that he would not have insisted that *Rouse* should have joined in the conveyance; besides he was so conscious of having a redeemable estate, that in 1719. he prefers a bill against *Rouse* and his wife and their daughter, the now plaintiff (who is heir at law to *Robert Rouse*) *Baldwin* and trustees, for incumbrances assigned, in order, it is said, to be quieted in his possession; but he likewise prays that if the Court should think his estate redeemable, *Rouse* may be decreed to redeem by a short day or be foreclosed;

foreclosed; and likewise confesses that he kept 1300*l.* of the purchase money in his hands to secure against any demands from *Rouse*.

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So that this has no resemblance to the case of *Bonham* and *Newcomb*, 2 *Vent.* (a) 364. which is likewise reported in 1 *Vern.* 7. 214. 232. 2 *Ch. Ca.* 58. 159. 1 *Eq. Abr.* 312. pl. 13. for there was no mortgage originally, but a conveyance was made to one who married his niece; and on condition that he paid him during his life 1000*l.* he should reconvey, and his heir should not redeem; which plainly shews that his intention was to prefer his niece in marriage with 1000*l.* or that estate at his own choice, but the feoffee could not compel him to pay the 1000*l.* in case he desired the money, and all mortgages being only a pledge for security of the money lent, must be mutual in the remedy; as the mortgagor has power to redeem, the mortgagee has power to insist on payment or a foreclosure, but the husband could not insist on payment of the 1000*l.* or a foreclosure if it was not paid; and upon this foundation it was decreed against the heir; for Lord *Nottingham* considering it as a mortgage decreed a redemption, notwithstanding the covenant that the heir should not redeem.

(a) *Supra*, p.
606.

It is a known rule, that if a trustee conveys, though upon valuable consideration, to one who has notice of the trust, he is liable in equity to the performance of the trust. (1) If then *Baldwin* on non-payment within a year stood a trustee, as is insisted, for *Rouse*, his vendees coming in with notice of that trust will stand in the place of *Baldwin* himself, who is acknowledged to be redeemable.

Where one purchases with notice of a trust he is liable to its performance, though he paid a valuable consideration. *Com. Dig. Tr. Chancery* (4 J. 4.)

As

(1) It is laid down (among many others) in the case of *Mansell v. Mansell*, reported in *Forrester*, that "if an estate subject to a trust is purchased from the trustees for a valuable consideration, without notice, a court of Equity cannot affect the purchaser, but

they can the trustees; but if such purchaser had notice, then the trust goes along with the estate, and the land still continues subject to it." p. 260. The Lord Chancellor, in the cause of *Brandlyn v. Ord*, declared that a man who purchased for a valuable consideration, with

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Supra, p. 343.

As to *Baldwin's* being in possession as owner, and presenting to a benefice, that will not strengthen the case, for *Baldwin* had the legal estate, and consequently had a right to present at law; but since a presentation is gratuitous, and the mortgagee cannot account for any benefit from it, a Court of Equity will compel the mortgagee to present the nominee of the mortgagor; and although by the deposition of Mr. *Williams* it appears that Mr. *Baldwin* presented, it does not appear but that he might have presented at the nomination of *Rouse*.

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And the fine between *Rouse* and his wife and *Baldwin* doth not vary the case, for it doth not appear to what uses that fine was declared; and if there was no declaration of uses, it results to the use of those who had the estate before; it is true if a tenant in tail makes a lease not warranted by the statute, and afterwards levies a fine, it corroborates the estate of the lessee; that is, it gives him such an estate as the lessor might have made to him by fine, but it does not vary the nature of the lease, which continues subject to the same reservations, provisoes, conditions and covenants as before.

And if the fine be levied before any interest vested in the lessee, as where the lease is to commence *in futuro*, and the fine is levied before it commences, it does not operate in confirmation of it.

So here the fine to *Baldwin* may operate to strengthen his estate, and free it from the dower of the wife, which could not be barred but by fine; but it confirms it *in statu quo*, it confirms it as a mortgage, and does not discharge it from the equity of redemption to which it was before liable; for then every fine by a mortgagor, after a mortgage made, would render the mortgage irredeemable.

with notice of a voluntary settlement from a person who bought without notice, might shelter himself under the first purchaser, provided he had the very same interest in every respect. 1 Atk. 571.

As to the length of time, it is of little weight in this case, for although Lord *Nottingham* did look upon the statute of limitations as a proper rule to determine the time of redemption; yet that has in many cases been varied from, and no certain rule in point of time has been fixed upon.

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Supra p. 607.

1 P. Wms. 270.

3 P. Wms. 282.

Forrest. 62.

2 Atk. 495.

But here the conveyance to *Powel* was in 1716. and he preferred a bill in 1719. for a foreclosure; and this bill by the plaintiff for a redemption was exhibited in 1729. so that the time of twenty years limited for entry before an ejectment was not elapsed before the bill for redemption against *Powel* was exhibited.

It was therefore decreed, that the deputy should take an account of what was due to *Powel* for principal and interest, and an account of the rents and profits received since the conveyance to *Powel*, and that the administrators of *Baldwin* should account for what rents and profits were received by *Baldwin*, and should take an account of the interest due for the monies advanced by him until he was paid off by *Powel*; and that costs should be reserved until the account taken; that upon payment by *Croft* of what should appear due to *Powel*, he should be permitted to redeem, or otherwise his bill should be dismissed. (2)

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And upon hearing the cause that stood next *inter* Sir *John Morgan* *vers.* *Powel & al'*, wherein Sir *John Morgan* as heir and administrator with the will annexed to *J. Ridhouse* his grandfather, to whom *Robert Rouse* had confessed judgment in *M. Term* 1710. in the sum of 1200*l.* being the penalty of a bond given by *Rouse* to him for securing 695*l.* which judgment was prior to the mortgage to *Croft*, which by the verdict was found not to be executed till the 5th of *July* 1712. though dated in *April* 1709. it was by the consent of all parties concerned for *Croft* and *Powel* decreed, that an account should be taken of what was due on that judgment,

(2) The case of *Manlove* *vers.* *Ball* appears to have been determined upon and *Bruton*, reported in 2 Vern. 84. the same principle with the present.

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as well as of what was due to *Powel*; that Sir *J. Morgan*, on payment of what should appear due to *Powel*, should be permitted to redeem him, or if he refused, his bill should stand dismissed; and that in case Sir *J. Morgan* should redeem *Powel*, *Croft* on payment of what should be due to Sir *J. Morgan* should be permitted to redeem both; that the parties should be examined on interrogatories, and the deputy armed with power to send for persons, papers, records, and to issue a commission to examine witnesses, &c.

[612] Osbaldifton *vers.* And. Crofs, Harry Crofs,
Cafe 263. Will. Kroger and Richard Chancy. In
Scacc'.

The Court refused to order an account in equity for an attorney's bill which had been taxed by a prothonotary of the Court of Common Pleas. 2 Eq. Abr. 8. pl. 21. S. C.

THIS was a bill suggesting, that the plaintiff being an attorney of the Common Pleas, and having a tenant or servant in a publick house, agreed with the defendants *A. and H. Crofs*, Brewers, to lay his beer and ale to the said house, which he the plaintiff would pay for; that the defendants brought in a bill for 314*l.* 15*s.* that the plaintiff brought in a bill for business done for the defendants sometimes as partners, sometimes on their several accounts, amounting to 324*l.* 15*s.* 1*d.* that this bill was taxed by a prothonotary at 102*l.* 17*s.*; that the defendants had on a trial a verdict for 210*l.* 18*s.* this 102*l.* 17*s.* being pleaded by way of set off, and an allowance made of it by the Jury. But it was insisted by the plaintiff, that the prothonotary in his taxation deducted 41*l.* 15*s.* out of the plaintiff's bill as received by the plaintiff, which had been otherwise discounted; and the taxation being upon a plea put in to an action brought in by the defendants as partners, the prothonotary had disallowed all sums disbursed by the plaintiff for any of the defendants on their several accounts; and so prayed that the defendants might come to a fair account with the plaintiff for the monies due to him.

The defendants did not plead, but insisted by way of answer in bar to the account prayed.

OSBALDISTON
v. Cross and
Others.

And the plaintiff being ready to read his proofs, the defendant's counsel objected, that admitting the suggestions of the bill proved, the plaintiff's bill ought to be dismissed, as having no foundation for relief in a court of equity; for if the defendant should be decreed to account here, it would tend to over-hale that taxation of his bill which had already been taken and settled in a proper court; and in case the prothonotary did not make all just allowances, upon application to the Court of Common Pleas, the Judges would have referred it back to be reconsidered; and in case this method should prevail, which is without example, every cunning and litigious attorney would prefer a bill in equity whenever his whole bill was not allowed, in order to have it re-examined, and the account taken in a court not so proper for it. And though it is said, that the bill, with respect to the business done for the defendants in their separate capacities, was rejected by the prothonotary, as not within the rule of reference; yet that is a matter determinable at law, and no impediment to the plaintiff's issue at law, as suggested; and by the same reason every attorney may avoid suing for his fees, and bring a bill against the defendant for an account in another court where his bill cannot be taxed. And though it be said, that 41 l. 17 s. 1 d. was charged as received by the plaintiff, which was discounted otherwise, that might have been a ground for a re-examination, if the Court of Common Pleas had been applied to; or if any person had received that sum without consideration, it is money received to the plaintiff's use; but after he had insisted on this before the prothonotary, and acquiesced in his taxation, and had had the benefit of it upon the trial, it is too late to insist on in this matter; and although this might have been pleaded, yet it may be insisted on by the defendant's answer. And of that opinion was the Court, and the bill was dismissed.

[613]

Case 264. Hungate *vers.* Fothergil, Administrator of
Eliz. Best. In Scacc'.

A charge for
board is not to
be deducted out
of money due,
unless it was so
agreed upon.

[614]

THIS was a bill to have the conveyance of an estate discharged of 6*l.* *per annum* granted out of it to *Elizabeth Best* for her life, on payment of what was in arrear at her death. It was referred to the deputy to take an account of what was due; who reported 44*l.* 16*s.* 1*d.* to be due; but an exception was taken to the report, because no deduction was made for what was due for the board of *Elizabeth Best*, which ought to have been allowed out of the arrears, since her board must have amounted to that sum or more. But since no agreement appeared that the board should be set against the annuity, the Court thought that the deputy had done right; for *Non constat* but that she might have paid for her board (and the deputy said that she did); and therefore the exception was disallowed, and on the payment of 44*l.* 16*s.* 1*d.* the defendant should convey; but on the failure of payment in six months his bill should be dismissed with costs.

Case 265. Bishop *vers.* Burton & Al'. In Scacc'.

A will shall not
be read on proof
of a witness's
hand, unless
there be positive
proof that he is
dead.
2 Eq. Abr. 765.
pl. 17. S. C.
3 P. Wms. 192.

THIS was a bill for an account of the personal estate, and if that was not sufficient, of the real estate devised by *Marriot Pett* to *William Jessup* and *William Finch*, for a term of 500 years, for the payment of his debts; and sets forth, that *Marrist Pett* by will, dated the 16th of October 1706. devised *ut supra*, on trust for the payment of his debts, and afterwards to raise 206*l.* a-piece to his daughters *Elizabeth* and *Jane*; and died in 1722. That the executors refusing to act, his son *William Pett* took administration with the will annexed; that the defendants *Burton* and *Bance* entered on these houses by virtue of an outlawry against *William Pett* the son, which was now avoided by his death, and judgment for an *Amoveas manum*, and therefore prayed

an account of the profits from *William Pett* generally, from *Burton* and *Bance* since the recall of the outlawry. But when the plaintiff was put to prove the will, the proof was of the hands of *Marriot Pett* the devisor, and of *Gilbert Innis* and *James Sawhill*, two of the subscribing witnesses, who were proved to be dead; and as to *J. Barrington* the third subscribing witness, the witness deposed, that he was credibly informed in the country where he lived, and believes it to be true, that he died two years before, and believes his name subscribed was his proper hand-writing. But the Court was of opinion, that that was not sufficient proof to have the will read in evidence.

BISHOP v.
BURTON.

Term. Sanct. Hill.

12 Geo. II.

Case 266.

Anonymous.

A court of equity may order a feme covert who is an infant, being an heir or trustee, to levy a fine.

A Petition in Chancery was exhibited against an infant, the heir of a mortgagee in fee, upon the statute 7 Anne, c. 19. (1) which (reciting that many inconveniences arising by reason persons under age of 21 years having estates in trust or by way of mortgage cannot convey any sure estate in such lands and tenements) enacts, That persons under age, by the direction of the Courts of Chancery or Exchequer, on petition of the *Cestui que Trust* or mortgagor, shall convey and assure such lands in such manner as the Court shall direct; and such conveyance or assurance shall be as good and effectual to all intents as if such infant was of full age; and such infants shall and may be compelled to make such conveyances and assurances in like manner as trustees or mortgagees of full age are compellable to convey or assign their trust or estate.

The heir, against whom the petition was, was a feme covert, and it was doubted by the Master of the Rolls, whether she could be compelled to levy a fine, because such fine must enure to a double intent, first, to assure or convey the estate as she was an infant, and then to bar her as she was

(1) This statute extends only to plain and express trusts, and not to those trusts which are implied and ex-

ist only by construction of equity. *Goodwyn v. Lister*, 3 P. Wms. 387.

a feme covert; upon which application was made to the Lord Chancellor, who proposed the matter to my consideration, as it might be a case that might come before the Court of Exchequer. ANONYMOUS.

And I thought that the Court might order an infant that was a feme covert to levy a fine, (2) for the act is general; first, That all persons under age shall convey and assure, so that it seems to be the intent of the act, that every infant, which comprehends all without exception, whether covert, or not; and a feme covert cannot assure otherwise than by a fine; and the statute directs that such infants shall convey and assure, and the inconvenience before the statute is recited to be, that before an infant could not make a sure estate, so that whatever act is necessary for any infant to do in order to make a sure estate, or assure to the party the lands, &c. the infant is compellable to make, for he is to convey or assure in such a manner as the Court shall direct, and such conveyance shall be good and effectual to all intents in such manner as if the party was of full age. It seems to be left therefore to the discretion of the Court what conveyance is proper; and whatever it would be needful for a person of full age to do to make a sure estate, the Court may direct an infant to execute; and consequently since a feme covert of full age could not assure but by fine, the Court may direct an infant to convey in the same manner; it is true that in many cases a deed shall not enure to a double intent, but that is when one intent was singly in view; for if one and the same act must in the nature of the thing have a double operation or effect, the law will allow it to enure to a double intent; as if a disseisor grant to the disseisee for life or in tail, who assigns it over to another, such assignment enures as a trust and confirmation too. *Co. Lit.* 302. a. [616]

(2) The Lord Chancellor, in the case of *Winnington v. Foley*, reported in 1 P. Wms. 538. declared that he did not know how he could direct the judges or commissioners to take a fine from an infant; but ordered the master to direct a proper conveyance. 5 Co. 15. a.

Case 267. The King *vers.* Rich. Manning. In Scacc'.

In smuggling goods all present and aiding are principals and equally liable to the whole penalty.

[617]

THIS was an information by the Attorney General against the defendant, for that merchants unknown having imported 100 weight of tea, value 50*l.* and landed them in the port of *London*, the duties not paid or secured, the said tea came to the hands and possession of the defendant, knowing the duties not to be paid or secured; whereby he forfeited 150*l.* the treble value. The defendant pleads *Non devenerunt*; and on a trial before Chief Baron *Reynolds* a special verdict was found, That the 100 weight of tea was imported and landed, the duties not paid; that *Thomas Quois* and the defendant, who knew that the duties were not paid or secured, bought the tea for 20*l.* on their joint account of one *Samuel Gibbon* of *Ashburnham* in *Suffex* privately, but only a third of the money was paid by the defendant; that they afterwards carried it to *Gudham* in *Kent*, and there divided it into twelve parcels, and brought it on horses in sacks to a place near *London*, and thence carried it into *London* by night under their coats to an inn in *White-chapel*, where, by the defendant's direction, it was put under a bed, on which the defendant laid himself down whilst *Thomas Quois* went out to see for a purchaser, to whom they sold it for 24*l.* and the defendant had 8*l.* the third part of that price, for his proportion of the tea.

That the value of the tea was 24*l.* the treble value 72*l.*; and whether the whole 100*l.* of tea came to the defendant's possession they submit to the judgment of the Court; and if the Court be of opinion that the 100 weight of tea did come to the possession of the defendant, they find so; but if the Court think that only a third part of it came to his hands, they find that a third only came to his possession. By the statute 8 *Anne*, c. 7. *sec.* 17. if any goods whatsoever liable to the payment of duties shall be unshipped with intent to be laid on land, (the customs and other duties not being first paid or secured) or if any prohibited goods shall be

be

be imported, not only the goods shall be forfeit, but also the persons assisting or otherwise concerned in the unshipping thereof, or to whose hands the same shall knowingly come after the unshipping, shall forfeit treble the value thereof.

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And it was insisted by Mr. *Strange*, Solicitor General, that the treble value of the whole 100 weight of tea was forfeit; for the defendant and *Quoif* having bought the tea on their joint account, the defendant had the possession of the whole, and partners in a wrong are answerable for the whole; and cited a case *Mich. 1721. Doe ver. Butlar*, on a *Devenerunt*, where it was said, That the defendant having carried away for his share but four anchors of the 320 gallons of brandy and 200 gallons of wine charged in the information, ought to be charged with no more than what he carried away; but by *Montague* Chief Baron, as the defendant was present when the whole quantity came on shore, he was liable for all, it not being material what he carried off himself; and a verdict was for the King for the whole.

[618]

So in *Michaelmas 1726. The (a) Attorney General versus (a) Bunb. 223. Ambro. Burgefs*, on a *Devenerunt* for 3000lb. of tea and 200lb. of coffee, it appeared that the defendant had several partners in the goods, and that all did not come to the defendant's own hands; but *Pengelly* Chief Baron, As there appeared no distribution to be made between the partners, and they having a joint property, the possession of the persons to whose hands the goods came was the possession of the defendant; and when several persons are concerned in a fact of this nature, though they are not all together when the fact is committed, every one may be prosecuted for the penalty separately; that the receiving of the goods by the defendant's agents after the landing, was sufficient to charge the defendant, and as all the partners acted their parts, they were agents for one another, and all chargeable; that where several were concerned in taking goods, trover lay against

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any one; and the King had a verdict for the whole quantity.

So in the cases, *The Attorney General* vers. *John Palmer*, in *Pasch.* 1727.

(a) Bunb. 223.
(in N.)

The (a) *Attorney General* vers. *Edward Carbeld*, in *Hil.* 1732.

The *Attorney General* vers. *Sweeting*, in *Pasch.* 1727.

Infra, p. 625.

[619]

The Court took time to consider those cases, and after some days consideration, I was of opinion for the King, but not merely because the goods were bought on their joint account, for though jointenants *sont seise per my et per tout*, yet to divers purposes each hath but a right to a moiety, as to infeoff, give or demise, to forfeit or lose by default. *Co. Lit.* 186. a. If two purchase, and one is a Villain, the Lord can enter but into a moiety, or if one be an alien, the King, on office found, shall have but a moiety.

If one jointenant be indebted to the King, but a moiety shall be extended; and if he die before any extent, no extent shall be made on the land in the hands of the survivor. *Co. Lit.* 185. a.

If *A. B.* and *C.* are partners, and judgment and execution is sued against *A.* only his share of the goods can be sold; it is true the Sheriff may seize the whole, because the share of each being undivided cannot be known; and if he seize more than a third part he can only sell a third of what is seized, for *B.* and *C.* have an equal interest with *A.* in the goods seized; but the Sheriff can only sell the part of him against whom the judgment and execution was sued. So it was resolved by *Holt* and the Court, *Heydon* and *Heydon*, *Mich.* 5 *W. & M.* 1 *Salk.* 392. (b) So it was holden (c) 1 *Shorw.* 174. per *Holt*, and no Judge denied it, and *Pollexfen's* opinion accords. And in that case *Backhurst* and *Clinkerd*, 1 *Shorw.* 174. when a *Scire Facias* issued against *B.* after the seizure of all the partnership goods upon the judgment and execution against *A.* and the Sheriff returned *Nulla bona*, it

(b) *Holt*, 302.
S. C.
Supra p. 277.
Infra p. 626.
(c) *Holt*, 643.
S. C.
2 *Ld Raym.*
871.
Supra p. 277.
Infra, p. 626.

it was holden a false return ; for *B.* had a share of the goods, and the possession continued in him, notwithstanding the seizure upon the execution against *A.* The KING v.
MANNING.

But for the more explicit declarations of the grounds of my opinion, I do agree, First, That where several persons are engaged in a tortious act, all present and aiding and assisting in it are equally culpable, and liable to answer for the whole of the mischief done, and that where they are parties in the act, though not perhaps present at that particular branch of it for which he is charged. It is so in the case of robbery, burglary or other felony ; and therefore if *A.* and *B.* engage in a robbery or burglary, and *A.* stands to watch while *B.* breaks open and robs the house, or while *B.* pursues and robs a person out of his sight, and if *B.* kills the man *A.* is guilty of the murder ; so it is if several come to do a trespass, to make an affray, rob a park, plunder a ship, or run prohibited or uncustomed goods, all engaged in the fact are chargeable with the whole doings, and all the consequences of it, if murder be committed by any of the company, though the rest were in other rooms, in other parts of the park, or know not what goods were taken or carried off by others, they are equally guilty ; for in the eye of the law they were all present aiding and assisting ; and therefore if the defendant had been found guilty of aiding or assisting, or otherwise concerned in unshipping the tea, I should make no question but that he would have been liable to the penalty of the treble value for what he or any others at that time carried off, for they were all aiding, assisting, and concurring in the same tortious act. Fol. 350.

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And this is what was determined in the cases cited ; in the case of *Doe* and *Butlar*, the Chief Baron *Mountague* saith, the defendant was present when the whole came on shore, therefore it was not material what he carried off.

So was the determination by Chief Baron *Pengelly*, in the case of the *Attorney General* and *Burgefs* ; all the partners acted their parts, and were agents one for another, and all chargeable. It is said indeed before, the partners having a joint

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joint property, the possession of the persons to whose hands the goods came was the possession of the defendant; but this cannot be meant of a joint property by purchase, but where several persons are parties in the tort; in running the goods into other hands, the possession of those to whose hands the goods came is the possession of the defendant, who was a party in the running of them, though he was not the particular person who brought the goods to the hand in which they were found; for so it is, added he, where several persons were concerned in a fact of this nature, though not all together when the fact is committed, yet every one may be prosecuted for the penalty separately; this, or similar to this, must be the case to make all the expressions pertinent and consistent, if we have a full and right account of them.

Carth. 171.
Dyer. 159. b.
160. a.

[621]

So in the case of the *Attorney General* *vers.* *Palmer*, which was on a *Devenerunt* for 1000 lb. of coffee. It was objected, that the defendant being hired with others for carrying the goods in the information, he was chargeable for no more than the two bags which he carried.

But it was answered by Chief Baron *Pengelly* very rightly, that the defendant was a person to whose hands the goods came within the nature of the statute; for as all the persons went together with one intent, the Crown might charge whom they would. All agents are to be charged, otherwise the act was not made full enough for the benefit of the Crown; and it appeared that the defendant had the whole charge of the goods for some part of the time. A private person may bring an action against any one, where several are concerned in taking his goods from him. He remembered an action against two for stranding a ship, when 200 were concerned, and a verdict against them, and they paid the money.

So in the case of the *Attorney General* *vers.* *Edward Carbell*, on a *Devenerunt*, for 6000 lb. of tea, which it was proved the defendant and others brought from the sea-side at several times. It was objected, that the defendant could not be charged

charged with more than the three horse-loads he carried, since the defendant had not the command of the rest, nor was their master.

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But it was answered, Where several are concerned in a joint design, they are all answerable, as in cases of costs and wrongs. In trespass, if several take away goods, all are answerable for the whole. In this case they were all jointly concerned in the same thing, and every one answerable for the whole; the last case, *The Attorney General and Palmer*, was cited that the several prosecutions there could be but one recovery by the King; for if satisfaction was recovered from one for the whole, the others were discharged; if several are bound in a bond, all may be sued, but there can be but one satisfaction.

Bunb. 223.
(1a N.)

Per Chief Baron Reynolds. Where several are jointly concerned it is a joint undertaking, they are all liable for the whole, though the Crown can have but one satisfaction. And the King had a verdict for the whole.

[622]

And a case was cited, *P. 1727. inter The Attorney General and Sweeting*, on a *Devenerunt* for 1800*lb.* of tea, 100*lb.* of cocoa, 150*lb.* of coffee.

Objection. The defendant was not chargeable within the words of the statute; for he kept a public-house, and was not responsible for the goods brought there by the guests; the goods belonged to another, and the defendant could not know but by hearsay that the goods were run. But Chief Baron *Pengelly* was of opinion, that since the act made, not only the importer, but those to whose hands the goods came after, were liable to prosecution, the Crown might charge all to whose hands the goods came after importation; for the first might not be found, and if other persons could not be prosecuted, the act would be evaded; and where a person delivers run goods over to another, both are equally guilty.

And afterwards, viz. in February 1738. *Hil. 12 Geo. 2.* the Court gave their opinion. And it was agreed, first, That
in

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in all cases of tort, all persons present, aiding and assisting are equally liable for the whole mischief done; and one shall not excuse himself by saying that he did but little part of the trespass; for in trespass there are no accessaries, but all aiding and assisting in it are liable.

So that in pulling down a house, plundering a ship, running goods, which are illicit and tortious acts, all are responsible for the whole damage done. And this is what was determined by Chief Baron *Montague*, *Doe* ver. *Butlar*, the defendant being present, and helping to bring the whole on shore, was responsible for the whole, and it is not material what he himself carried.

So by Chief Baron *Pengelly*, in the cases of *The Attorney General* ver. *Burgefs*, and *The Attorney General* and *Calver*, That where several persons are concerned in a joint fact of this nature, though not all together when the fact is done, every one may be prosecuted for the penalty separately.

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So Chief Baron *Reynolds* determined in the case of *The Attorney General* and *Carbeld*, where several are jointly concerned, and it is a joint undertaking, they are all liable for the whole.

Secondly, It is agreed, that where run goods come to the hands of any person knowingly, by this statute 8 *Ann.* such person is made liable to the same penalty of the treble value, although he is but in the nature of an accessary in receiving the goods, as well as the principal, who was assisting in the running and unshipping of the goods. But there is this difference between them; he who was present in helping the goods on shore is a party in the illicit act itself, and therefore is chargeable with the whole; but he who receives any part of the goods after they are put on shore is not a party to the original act, but is only culpable for what he receives, and consequently can forfeit only the treble value of the goods which came to his hands.

And

And I believe nobody would think it so consonant to justice, that the receiver of a pound of tea or coffee, which had not paid duties, should pay the treble value of 1000*l*. which was run at the same time, which he knew nothing of. Our law is very cautious in extending punishment beyond its due proportion; and therefore in trespasss, mayhem, *premunire*, &c. there are no accessaries, for accessaries before by counsel or command are in the same degree as principals; but the accessory after, by receiving the offender, cannot by law be under any penalty, unless the statutes which induce the penalty expressly extend to receivers and comforters, as some do.

1 *Hale's Hist. P. C.* 613.

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4 Bl. Com. 36.

Thirdly, It is agreed, That if a person be hired to carry goods which have not paid duties, knowing the duties unpaid, he is a person to whose hands the goods knowingly came, and consequently liable to the penalty of the treble value, otherwise the act might be easily eluded.

But there is a difference where a person is hired to help the goods on shore, from him, who being present, and aiding and assisting in the unshipping of the goods, is party in the wrong, and liable as every principal actor to answer the whole damage. And that was the case of *The Attorney General and Palmer*, wherein it was said, that all the persons hired went together with one intent to carry off the goods. If persons are hired to pull down a house, they are all trespassers. But if a porter be hired to carry a parcel of tea after the importation, which he knows was run, he is a person to whose hands that parcel came within the intent of the act, and will be liable to the treble value of that parcel: but I believe nobody will say that he is answerable for the treble value of the whole cargo.

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Fourthly, So likewise if a keeper of a public house receives the whole parcel, which any of his guests, whom he knows to be a smuggler, brings to him, and takes it into his possession and conceals it for him, he is a person to whose hands those goods came, and will be chargeable with the penalty of the treble value of what he so concealed, but not of the goods carried

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carried by other persons to other places. So was the case of *The Attorney General and Sweeting*, and many subsequent determinations.

Fifthly, So likewise if a person buy any quantity of goods which he knows were run, and the customs not paid, he will be chargeable with the treble value of the goods so bought, for he is a person to whose hands the goods came; for though it was under the pretence of a contract, yet since he knew that the customs were unpaid, it was an illicit contract, and he becomes *particeps criminis* by receiving those goods; and the contract or purchase will no more exempt him than if he had bought goods of a pirate or felon, which alters not the property of them.

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By the stat. 8 Geo. c. 18. §. 10. Forasmuch as persons using clandestine trade, are greatly encouraged by many for private lucre, who buy and receive goods clandestinely imported; if any shall receive or buy any goods clandestinely run or imported before condemned, knowing the same so to be clandestinely run or imported, forfeits 20*l.* on conviction before a Justice of the Peace.

Supra, p. 618.

But suppose two persons join stock together, and buy goods on their joint account, and one is constant that the goods are run, and the other is not, (which was the present case, for it cannot be intended that *Quoif* knew the goods were uncustomed, unless it had been so found, for *fraus non est presumenda*), I am clearly of opinion that the defendant is liable to the treble value, though *Quoif* is not; but then the question will be for what quantity he is liable; and I am of opinion, that if they had divided the goods after their purchase, that the defendant could be liable only to the treble value of his share, and no more, for no more came to his hand or possession; for though jointenants are seised or possessed *per my & per tout*, that is, they are so far possessed of the whole that none can say, till partition made, that this or that part is not in his possession, yet they in right and reality are possessed of no more than their proper share or purparty.

As therefore they give or dispose of no more, so neither can they forfeit any more. *Co. Lit.* 186. a. The KING v. MANNING.

If a villain and freeman purchase, the Lord is entitled to what his villain is possessed of, yet he can enter into a moiety only. Supra, p. 619.

So if an alien and natural-born subject purchase, though the heir is entitled to all the alien was seized or possessed of, yet the heir, on office found, can have but a moiety. The treble value of what comes to the defendant's hands is the measure of his penalty, but that must be meant of what really and truly comes into his possession, and not what notionally and virtually only can be said to be in his possession. Supra, p. 619.

If partners be of goods, and execution be sued by *Fieri facias* against one for his separate debt, the Sheriff may seize the whole in order to inventory and appraise them, and to have a true account of the value; but he can sell but the share of him against whom the *Fieri facias* was sued, for the *Fieri facias* warrants him to levy *de bonis & catallis* of the one, and all may in some sense be said to be his goods, because he hath a joint interest in all, yet since he hath a right and possession of a moiety only, the Sheriff can dispose of no more. *Heydon* and *Heydon*, 1 *Salk.* 392. [626]

And notwithstanding such seizure of the whole, the other partner continues in possession of his share or moiety; and therefore where *A. B.* and *C.* were partners, and upon a *Fieri facias* against *A.* the Sheriff had seized the whole, and a *Fieri facias* came against *B.* and the Sheriff returned *Nulla bona*, it was resolved that an action on the case lay against him for the false return, for *B.* was still in possession of his third part of the goods. *Bachurst* and *Clinkerd*, 1 *Show.* 174. Supra p. 619.

However, as this special verdict is found, I think the whole 100 weight of tea came to the defendant's possession, for it is said, that he took care of the whole, that by his direction it was put under the bed, and he lay down on the bed; so that apparently he had at one time the whole under his custody and

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and care, and used endeavours to conceal it, knowing the whole to be uncustomed goods. What more does an inn-keeper or alehouse-keeper do, who takes the goods of a smuggler to lay up and conceal? So it was determined in the case of *The Attorney General and Sweeting*, 1727, and many times since.

A jointenant may make his companion his bailiff, and maintain account against him as such. *Co. Lit.* 186. a. Here *Thomas Quif* intrusts the defendant with the goods to conceal and secure them; suppose he had embezzled them, would he not have been chargeable by his companion for them? And if so, he must have possession of them.

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It is not necessary that he to whose hands goods came should have the absolute possession in them. If a man delivers money to a servant to carry, and he is robbed of it, the servant may maintain an action against the hundred, and declare that he was possessed *ut de bonis suis propriis*. So it was resolved 4 *Mod.* 303. *Combs* (a) vers. *Hund. of Bradley*, and yet the possession is not divested out of the master, for he may bring an action if he pleases.

(a) Comb. 263.
Holt, 37.
12 Mod. 54.
S. C.
Supra, p. 328.
(In N.)

And judgment was given by the whole Court, that the defendant should be charged with the treble value of the whole 100 weight of tea, which amounted to 72*l*.

Case 268.

Philip Earl of Chesterfield vers. Charles Duke of Bolton. In Scacc.

A covenant to keep a house in good and sufficient repair, and so to leave it, binds the covenantor to rebuild, if the house is burnt down by accident.
2 *Ld Raym.* 911.
1165.
3 *Burr.* 1638.

THIS was an action of covenant, wherein the plaintiff declares, That by an indenture dated the 21st of July 1713, between *Anne Vaughan*, sole daughter and heir of *John* late Earl of *Carbery*, of the first part, *Scroop* Earl of *Bridgewater*, *Cho.* Earl of *Sunderland*, *Edward William Pawlett*, and the plaintiff, then named *Philip Dormer Stanhope*, of the second, *Sir Thomas Stepney*, *Sir Edward Manfell*, *Sir Nicholas Williams* and *Griffith Rice* of the third, the defendant then Marquis

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Marquis of *Winchester*, of the fourth, and *Richard* and *John Vaughan* of the fifth part, reciting, that the late Earl of *Carbery* devised his estate in *Com. Carmarthen* for 100 years to *Richard* and *John Vaughan*, on trust to raise 150*l. per annum*, for the maintenance of his two sisters *Lady Frances* and *Lady Altham* for their lives, reversion to his daughter and her heirs; and that in consideration of a marriage between her and the defendant she conveyed to the said Earls of *Bridgwater*, *Sunderland*, Lord *William Pawlett*, and the plaintiff and their heirs, all the capital messuages called *Golden Grove*, the demesne lands, park, warren, &c. to the use of the defendant and the said *Lady Anne Vaughan* his intended wife, after the marriage, for their lives and the life of the survivor, without impeachment of waste, except such waste afterwards restrained; then to trustees, to preserve contingent estates; then to the first and other sons of the defendant on the body of the said *Lady Anne* in tail male; then to the daughters of the said marriage; then to such uses as *Lady Anne* by deed or will should appoint, and for want of appointment to her and her heirs; the defendant covenants with the said Earls of *Bridgwater*, *Sunderland*, Lord *William Pawlett* and the plaintiff, that at all times during his life, the defendant should and would sufficiently repair and keep in good and sufficient reparation the said capital messuage called *Golden Grove*, and so leave the same at the time of his decease; he being allowed to cut sufficient timber for repairing the same. And the plaintiff assigns the breach, that after the said marriage, viz. on the 1st of *May* 1730, and from thence continually hitherto, the said capital messuage called *Golden Grove*, and all the buildings thereof, have been in decay and wanted good and sufficient reparation, and great part thereof fallen down; and although the defendant during all the said time was allowed to cut down sufficient timber for repairing the same, yet he hath not repaired the same or any part, or kept it in good and sufficient repair.

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The defendant by leave of the Court pleads double; first, That he hath repaired and kept in good and sufficient repair

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the said capital messuage according to the form and effect of the said covenant; and thereon issue is joined.

Secondly, That before the said 1st of *May* three fourth parts of the said capital messuage was burnt down, and that he repaired and kept it in sufficient repair until it was so burnt down; and that he hath sufficiently repaired and kept in repair the residue of the said messuage that was not burnt down, upon which the plaintiff demurs.

And it was insisted by Mr. *Taylor* Counsel of the defendant, that by this accident the defendant was excused from the repair of the house; for, as in waste the defendant is excused by inevitable accidents, there is the same reason he should be excused in covenant. If a man covenants to deliver a horse, if the horse die before the time, he is excused. *Pal.* 549. And wherever a thing cannot be delivered in the same plight, he will be excused. 1 *Co.* 98. *Shelly's* case.

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Hard. 387.

Secondly, And this is the more reasonable since the statute 6 *Ann.* c. 31. sec. 6. (1) by which it is provided, That no action shall be brought or prosecuted against any person in whose house any fire shall begin, or any recompence made by such person, for any damage suffered or occasioned thereby; in which statute the words are general, and must extend to all persons; and it provides, That the person whose house is accidentally burnt shall not make recompence for any damage suffered or occasioned thereby; and this is the defendant's case, for the plea saith, That the house mentioned in the declaration was burnt by accident without any default of the defendant.

Thirdly, The plaintiff hath not intitled himself to this action of covenant, for the covenant is, That the defen-

(1) This section is made perpetual by the stat. 10 Ann. c. 14.

dant shall repair, being allowed to cut sufficient timber for repairing the same; so that the allowance of sufficient timber is a condition precedent, which ought to appear to have been complied with before the defendant can be charged with the repair.

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It is true that the declaration avers, that the defendant was allowed to cut sufficient timber, but does not say that there was any timber to cut; and the plaintiff ought to shew every thing requisite to be done on the plaintiff's part, previous to his action; and if there was no timber the defendant could not, nor was he bound to repair; and consequently the plaintiff should have said that there was sufficient timber which the defendant was allowed to cut down.

Fourthly, The declaration doth not shew that the plaintiff, who is the covenantee, had any interest in the land, and consequently that he is prejudiced by the house being burnt; the house belongs to the defendant himself during his life, and it doth not appear that he hath any son, or if he hath, he only could be damnified; Why then should the plaintiff recover any damages in this case?

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On the other side it was insisted, That in this case the defendant hath expressly covenanted to keep the house in good and sufficient repair, and therefore is obliged to do what he has undertaken to do; he might have excepted fire, as is frequently done; And what reason can there be for such an exception, if the party was not otherwise bound to make good any damage which might happen by fire?

This therefore is not like the case of waste, where inevitable accidents excuse; but even in waste, the defendant must repair in convenient time; and if blown down by tempest, consumed by lightning or destroyed by enemies, the tenant may take the materials which remain, to repair; much more where the covenant is express to keep in repair.

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So is *Dy. 33. a.* Where a lease was made of a meadow, in which the lessee covenanted to sustain and repair the banks, so that the meadow should not be surrounded, under the penalty of 10/. but by a sudden and outrageous flood, occasioned by overturning the weirs in *Devon*, the land was drowned and the banks demolished. By *Fitzherbert* and *Shelly*, the lessee is excused from the penalty; as where an house is burnt by thunder, or blown down by the wind, because it is the act of God, which cannot be resisted; but yet he is bound to do it up and repair it in convenient time by reason of his covenant.

So it is said in *Stile 48.* That the lessee is not chargeable for waste where an enemy invades, unless he be bound by a particular covenant to keep the land let, without waste.

In *Aleyn 27.* in the case of *Paradine* ver. *Jane*, which was an action of debt for rent, the defendant pleaded expulsion by Prince *Rupert* with an army; and it was resolved to be no plea; (2) for when a man by his own contract creates a duty or charge on himself, he is bound to make it good if he may, though an accident by inevitable necessity happen, because he might have provided against it by his contract. Therefore if a lessee covenant to repair an house, which is afterwards burnt by lightning or thrown down by enemies, he ought to repair it.

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(a) *Skin. 210.*
S. C.

So the case of *Pool* ver. *Archer*, in 2 *Show. 401.* (a) where there was a covenant to repair; and the house was burnt down; the lessee pleads entry by the lessor the next day after the house was burnt down, so that he could not repair; and judgment for the plaintiff.

(2) It was resolved to be a bad plea upon the ground of it's being to an action of debt brought for rent due upon the lease, which lies merely upon a contract between the parties, to which such collateral matter pleaded was no-

thing to the purpose. Had it been an action of waste, and the waste had been done by Prince *Rupert* and his soldiers, such a circumstance might have been pleaded to bar the plaintiff. *Style 47.*

So in the case *Sti.* 162. (3) *Comton* and *Allen*. So 2 *Leon.* 189. (a) So in 2 *Sand.* 420. (b) in the case of *Walton* verf. *Waterhouse*.

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(a) S. v. 96.
S. C.

(b) 3 Keb. 40.
S. C.

In all these cases it is determined, that the lessee is bound to repair, though the house covenanted to be repaired is consumed by fire.

This case was again argued by Mr. *Clark* for the plaintiff, and by Mr. *Starky* for the defendant.

And it was insisted for the defendant, first, That the action was not maintainable against the defendant in this case, because it does not appear that the house called *Grove Place*, was by settlement limited to the defendant in possession, for there is a term of an hundred years limited to *John* and *Richard Vaughan*, on trust to raise 150*l.* per ann. for his sisters; and another term of — years limited to trustees for the separate maintenance of the *Duchess* after her marriage; and *Grove Place* might be included in one of these terms; and if so, it could never be the intent that he should repair it till he came into the possession of the estate. *Sed non allocatur*; for if this would excuse the defendant, it was incumbent on him to shew that it was comprised in one of these terms, for it shall not be intended; but in case it was so, when the defendant has expressly covenanted to keep *Grove Place* in repair, he will be obliged to do it, although it had been settled as part of the separate maintenance of his wife. A man may oblige himself by covenant to repair an house in the possession of another.

Secondly, The covenant is, that he shall keep in repair, [632]
not that he shall rebuild, and therefore it could not be the

(3) The case of *Compton* verf. *Allen* is exactly in point; it was an action of covenant brought by *Compton* against *Allen* his lessee for years upon a covenant of the indenture, for not keeping the house let unto him in repair. The defendant pleads that the house was burnt by casualty. The plaintiff de-

murs to this plea, and for cause shews, that the plea was contrary to the defendant's express covenant by his deed, and therefore was not good. *Roll* Chief Justice said, that a lessee that covenanteth to repair, ought to do it if the house be burnt, be it by negligence or by other means. *Stile* p. 162. intent

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intent of the parties to bind the defendant beyond the common and ordinary repair, and not to make a new house, if by accident, without the defendant's default, it should be burnt or demolished. *Sed non allocatur*; for when the defendant covenants that he will repair, and keep in good and sufficient reparation without any exception, this imports that he should in all events repair it; and in case it be burnt or fall down, he must rebuild it, otherwise he doth not keep it in good and sufficient reparation; and this is warranted by the cases cited, which shew that the covenantor must rebuild if necessity require, as where the house is burnt by fire, &c.

Thirdly, The estate limited to the defendant is without impeachment of waste, and consequently the covenant to repair is contradictory and inconsistent with it. *Sed non allocatur*; for the estate is not absolutely without impeachment of waste, but it is with an exception, except as herein after restrained; and it is afterwards restrained from cutting trees in walks, or ornamental, and therefore the covenant to repair is not inconsistent with the estate given him; nor does it follow, that if a person has an estate without impeachment of waste, that he may not oblige himself by covenant to keep up an house upon it in repair.

Fourthly, It is not shewn that there was sufficient timber allowed to the defendant to put the house in repair; the covenant is, That the defendant shall repair and keep in good and sufficient repair, he being allowed to cut sufficient timber for repairing the same, that was not in the walks or ornamental to the said messuage; now this being in the nature of a condition precedent, it ought to be expressly averred that this was done, before the defendant can be charged with any breach of covenant for not repairing.

It is indeed said, although the defendant was allowed to cut sufficient timber for repairing, that was not in any walks or otherwise ornamental, but that is not full enough; for

for first, the word (*although*) is no proper or formal averment. Secondly, It is not shewn that there was any timber growing but what was in the walks or ornamental; and it should have been expressly alledged that there was timber sufficient besides what grew in the walks or was ornamental to the house; it is not enough to say that he was allowed to cut timber, if there was none to cut down. It was not sufficient to alledge that the defendant found good security, unless shewn who was the security he gave. *Yelv.* 49. Thirdly, It is not said, who it was allowed him to cut down the timber, and so altogether uncertain; this is traversable, and what issue can be joined on this averment?

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Sed non allocatur; for it was answered and resolved by the Court, that *licet* has been always holden a proper word for an averment.

And as to the other part of the objection, it is enough to make the averment in the words of the covenant; and in case there was not timber sufficient, the defendant might shew it; and as that was a matter for his benefit, it was incumbent on him to shew it, and it shall not be presumed, and it must be intended that he was allowed to take it by all who could give that allowance. Judgment upon this plea for the plaintiff. (4)

(4) The Court determined in the case of *Monk v. Cooper* reported in 2 Ld. Raym. 1477. and 2 Str. 763. that a lessee who covenants to pay rent, and to repair with express exception of casualties by fire, is liable upon the covenant for rent, although the premises are burnt down, and not rebuilt by the lessor. A similar decision, and upon the authority of the above case, was given in the case of *Brifour v. Weston* reported in 1 Term Rep. p. 310. and the law upon the subject is recognised by Buller Justice, in the case of *Doe v. Sandham*, 1 Term Rep. 710.

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Wallis *vers.* Pain and Underhill.

Clover seed is a
small tithe and
as such due to
the vicar,
Bunb. 344,
S. C.

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A Bill was exhibited in the Exchequer by the plaintiff, who was tenant or farmer under the impropiator of the great tithes in the parish of *Prittlewell* in the county of *Essex*, and insisted that the defendant sowed a field with Clover which was cut for hay; he let the Aftermath grow for seed which was cut and thrashed for feed, of which the plaintiff ought to have the tithe as a great tithe. The defendant *Pain* insisted, that he was farmer of a farm called *Milton-Hall*, and that there was a *Modus* to pay 2*d.* an acre and ten bushels of wheat to the Vicar in lieu of all small tithes; that he had paid to the plaintiff for the tithe hay of his clover, and that the aftermath of clover stood for seed and was thrashed for feed, which was a small tithe and payable to the Vicar; and Mr. *Underhill* the Vicar insisted upon the tithe of clover seed as a vicarial or small tithe.

And by the deposition of several witnesses it appeared, that the difference between Clover cut for Hay and that cut for Seed was considerable, and when made into hay it was cut while the grass was green and fit for cattle to eat; that when cut for seed it stood till the stalk was fear and good for nothing, but was thrown out for stover or fodder, and the seed was the only thing of value or regarded; and that the tithe of clover seed had been always paid to the Vicar in that parish, and looked upon as a small tithe; that the impropiator had never received it but once about five years ago, when the plaintiff took it from a woman in the parish; but for twenty or thirty years the defendant had received it as small tithes, and fifty years ago it had been paid to or for the Vicar; indeed the Vicar Mr. *Underhill* for a great part of the time he has been Vicar, held the great tithes likewise.

It was argued by Mr. *Banbury* and Mr. *Boote*, that clover seed is in the nature of a great tithe, and due to the plaintiff;

tiff; for as tithe hay is due to him, the seed of that hay must of consequence belong to him too; that where the parson is intitled to tithe hay, he will be intitled to the hay made of clover, as well as of other grafs; and if to the hay, likewise to the seed.

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It was agreed that they could not find that any case had been in Court, wherein it was determined that clover seed was great tithe, or that it did belong to those who had the tithe of hay; but two cases were mentioned, one from Ch. Bar. *Dod's* notes, and it was the case of *Stanford and Hughes* as cited in the case of *Pocock and Cole*, Hil. 1694. in these words, *Arable land pays tithes to the impropiator in kind, sainfoin was sown upon the land and sowed to seed, and the profit was in the seed, and not in the stalk; there was a custom of 2d. per acre for hay, payable to the Vicar; and it was resolved, That notwithstanding the stalk and seed was in the nature of corn, yet it should be looked upon as grafs and payable accordingly.*

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The other case was from Mr. *Brown's* notes in these words, *It was decreed that the aftermath of clover grafs is titheable, unless a Modus can be proved, 3 Jac. 2. Brook and Hall. And Hall and Babb was cited, Trin. 1683.*

In this case the Lord Chief Baron cited the case of *Pomfret*, parson of *Luton* in *Bedfordshire*, where it was determined that the tithe of *Sainfoin* should be paid as grafs, and not as grain, though there was proof of thrashing it and feeding hogs with it, and making bread with it; and the Vicar then had it.

This case of *Pomfret* vers. *Laundy and Waite*, is found *Trin. 32 Car. 2. f. 227.* wherein *Laundy* insisted that *Sainfoin* thrashed was looked upon as grain, and sown and often thrashed as grain, and that the tithe belonged to the impropiator, and not the Vicar. As to this defendant, the case was to be farther heard at the setting down of causes that term, when the Court would further consider whether he should pay tithe of *Sainfoin* to the impropiator or the Vicar,
but

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but no such decree can be found; and as to the other defendant *Waite* the question was determined on the stat. 31 H. 8.

Now by these cases it appears, that it was thought reasonable that the stalk and seed should go together, and consequently when the impropiator is intitled to the stalk, as he is when made into hay, he ought likewise to have the seed.

And it would be very inconvenient if it was otherwise, for the owner might shift his tithe to the parson or Vicar as he pleased; for when it was first cut, it is fit to be made into hay, the tithe whereof will belong to the parson; but if he let it stand to dry, that the seed may be ripened and fit to thrash, then the tithe will belong to the Vicar; and when shall it be said to be dry enough for the Vicar? When it is first cut, the tithe ought to be set out, and the parson will have it; but after a while the Vicar will claim it, although it was before vested in the parson.

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On the other side it was insisted by Mr. *Flezer*, Mr. *Wilbraham* and Mr. *Starkie*, That clover seed is in its nature a small tithe, at least it is a vicarial tithe due to the Vicar in the present case; that there is not one case in point against it, and tithe of no seed was ever looked on as a great tithe: It is said that the stalk and seed shall go together, but it is frequent that the seed or fruit of trees goes to the Vicar, when the tree goes to the parson; wood is always reckoned a great tithe, and goes to the Rector, unless the Vicar be specially endowed with it; but acorns as well as the fruits of all other trees were always holden as small tithes.

But if the matter was doubtful, in this case it appears that it has always been paid to the Vicar for thirty, forty or fifty years, so that there is no pretence in this case to say that it does not belong to the Vicar.

But it was a new case, and the Court took time to consider of it. And

Afterwards

Afterwards in the same term, I delivered their opinion as follows, viz.

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As this was a matter which might be considerable in its consequences in relation to the quiet of poor Vicars, I considered two points.

First, Whether clover seed was in its nature a small tithe, so that it would belong to the Vicar who was endowed *de Minutis Decimis*.

Secondly, Whether if that was in any respect doubtful, it would not belong to the vicar under the circumstances of the present case.

And I was of opinion that clover seed was in its nature a small tithe. By the constitution of *Robert Winchelsea*, Archbishop of *Canterbury*, an uniform payment of tithes was established in the province of *Canterbury*. *Volumus quod decime de frugib. (non deduct' expen') integre & sine diminutione solvantur, & de fructibus arborum, de seminibus omnibus, de herbis hortor', nisi parochiani fecerint redemption' pro talibus decimis*; where a manifest distinction is made between tithes *de frugibus* and tithes *de fructibus, seminibus & herbis hortor'*. And *Lind.* saith f. 188. *Decimis*, that tithes *de frugibus* strictly taken mean such only *quæ solent ligari*, but in a larger sense they comprehend not only tithes *de frumentis & leguminibus, verum etiam de vino, silvis caduis, creta fodinis & lapicidinis*, that is, all such as commonly are reputed great tithes.

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But speaking of tithes *de seminibus omnibus*, he saith f. 192. *de decimis*, that they comprehend all seeds, *sive in campis, sive in hortis, utpote lini, milia, canabi, grana porrorum, ceparum, hyssopi, caulæ, petrocilini, rapi, lactuce & aliar' berbarum*.

And upon the words making redemption *pro talibus decimis* he saith, tithes *de fructibus, seminib' & herbis quæ revera decimas inq' minutas computantur; sunt enim decimæ minutæ quæ proveniunt*

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proveniunt de milio, menthâ, anetho, & similibus; and he takes notice that Hortiensis says quod in Angliâ consistunt minute decimæ in lanâ, lino, lacte, caseis & agnis, in partu animalium, pullis, ovis, & decimis hortor', decimæ etiam mellis & cere numerantur inter minutas.

So that by the common law, as long as the distinction has been made between great and small tithes, which is as ancient as appropriations to religious houses, who usually engrossed the great, but left the small tithes to the curate, all seeds have been reckoned as small tithes.

The common law seems to follow the canon law in this point. *Coke* speaking of tithes saith, *quædam sunt majores, frument', zizania, fœnum, & quædam minores sive minute, quæ proveniunt ex menthâ, anetho, clerib', & similibus.* 2 *Inst.* 649.

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(*) Goldf. 149.
S. C. And all the resolutions, relating to tithes which proceed from things newly introduced into *England*, have holden them to be small tithes; it was so resolved *Pasch.* 38 *Eliz.* in the case of *Bedingfield v. Feak*, (a) *Cro. Eliz.* 467. *Mo.* 909. *S. C.* *Owen* 74. *S. C.* 2 *Roll. Abr.* 310, 335.

And in case the Vicar sues the impropiator for the tithes of saffron in the ecclesiastical court, no prohibition shall go. 2 *Roll. Abr.* 310.

So if the field was formerly sown with corn, and afterwards be sown with saffron, the tithes shall be paid to the Vicar; for *per Popbam*, the tithe of saffron heads are small tithes; and though the tithes of the field have been paid to the parson, yet when converted to another use whereof no grafts tithes come, the Vicar shall have the tithes. *Ow.* 74.

So in the case of *Sir Richard Uvedall* vers. *Tindall*, *Hut.* 77. *Cro. Car.* 28. *S. C.* the question was, on a special verdict, if woad was small tithes or great; and it was unanimously agreed that woad was small tithes; for if no circumstances

cumstances be to distinguish the case, hemp, line, saffron, hops, tobacco, and all such new things shall be *Minute decime*.

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So (a) 1 Sid. 447. where a prohibition was prayed to a suit by a Vicar for tithe of woad, suggesting it to be a great tithe, the Court doubted because it is reckoned, as the book says, *inter minutas decimas*, as hops, &c.

(a) 2 Keb. 628.
1 Mod. 50.
1 Vent. 75. S.C.

So (b) 1 Sid. 443. where on a motion for a prohibition to a suit for tithe of hops, it was said that hops, woad, and such small things of new invention, are *minute decime*.

(b) 1 Vent. 62.
2 Keb. 612.
S. C.

So Pal. (c) 219. In the case of *Ward and Britton*, the question was whether lamb was a small or a great tithe; *Bridgman* Ch. J. said *minute decime* comprehended only tithe of gardens, hemp, hops, saffron, &c.

(c) Palm. 113.
Cro. Jac. 515.
2 Roll. Rep. 97.
127. S. C.

So in 1 Vent. 61. It is said that hops are of the nature of small tithes.

So flax was resolved by three Justices to be small tithe, in the case of *Wharton and Lisle*, (d) 3 Lev. 365. 4 Mod. 183. *Carth.* 263. *Skin.* 341. 356. So it was holden in *Noah Webb's* case, 14 Car. 1 Rol. 643. S. 3.

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(d) Comb. 201,
209.
12 Mod. 41.
3 Salk. 349.
S. C.

It is true some opinions have been, that small tithes must be estimated not from the nature of the thing titheable, but from the quantity of the tithe, and therefore it was said in *Uvedale and Tindal's* case, if all the profits of a parish consist in such things, hemp, hops, wool, lambs, &c. may be great tithes. So in (e) *Cod. Ju. Eccl.* 691. it is said that hops in gardens are small, in fields great tithes; and in the case of *Wharton and Lisle*, *Holt* Ch. J. at first seemed of opinion that tithes must take the denomination of small or great, from the quantity of the crop growing, but the three other Justices held strongly that tithes were great or small from the nature of the things which yielded the tithes; and *Holt* yielded to it so far, that he
absented

(e) Gibb. Code
2d. edit. p. 663.

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absented himself when judgment was given; which he would scarcely have done, if he had been fixed in the contrary opinion.

And this seems the better opinion, for it gives foundation for continual debate, what shall be a quantity too large for small tithes; if it be said what grows in a garden, some gardens are not half an acre, others two or three acres; gardens are enlarged now a days to 50 or 100 acres. (1)

Perhaps that may be a proper distinction as to pease, beans or other pulse, because they had existence in former times, and appropriations were made *de Bladis & Leguminibus* to religious houses; but as to things newly introduced into *England*, there is but little reason that the patentees, who claim only what came to the Crown upon the dissolutions of monasteries, should have tithe of those things which were never appropriated, and to which the religious houses dissolved never had a title.

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As to clover seed there does not appear any express determination in this Court, that it is in its own nature a small tithe; it is a seed, and all seeds are mentioned as small tithe, and no instance appears that ever any seed was holden to be a great tithe; it is a seed newly introduced, and therefore there is reason to look upon it to be of the nature of those things of a new invention, which by the cases cited have always been holden as minute tithes.

Watf. Cl. L.
C. 39.
Bumh. 79.

It is true that clover grass made into hay is of the nature of all other grass made into hay, and consequently must belong to the parson, or other person who is intitled to tithe hay; but it does not follow, when it stands for seed, and is not made into hay, that the seed may not be small tithes.

(1) In the case of *Smith v. Wyatt* which he therefore claimed as a great tithe. But Lord *Hardwicke* held that reported in 2 Ark. 364 a bill was brought by the rector of a parish in Essex for the tithes of potatoes sown in great quantities in the common fields, potatoes being in their nature a small tithe, the sowing them in greater quantities could make no alterations.

Wood is a great tithe, but (2) acorns, mast, &c. are small tithes, (a) 11 Co. 49. a. Rape seed, caraway seed, turnip seed, mustard seed are small tithes; but if the herb be growing with other grafs and made into hay, it would be great tithe; vetches are great tithe if mowed or cut when ripe, but if cut green for cattle they are small tithes.

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(a) 1 Roll. Rep.
100. S. C.
Moore. 762.

So apples and other fruits are confessedly small tithes, but the wood of apple trees and other fruit trees, if cut in a year when no tithe is paid of the fruit, is as other wood for firing, great tithe; but in the year when tithe is paid of the fruit, if then felled no tithe shall be paid of the wood, the fruit being looked on as the principal.

And this may answer an objection, that it would be in the power of the occupier to make it great or small tithe, and so favour the parson or vicar as he pleased, by cutting it for hay or letting it stand for seed; it may as well be said that a man may fell his apple trees the year he tithed the fruit or after, to prejudice or favour the parson.

The cases mentioned from Mr. Dod's and Mr. Brown's notes are imperfect hints of those cases; I obtained a note of them from Ch. Bar. Ward's notes, which are thus:

In the case of *Stanford v. Hughes*, Pasch. 1680. The question was, Whether clover should pay tithe as hay, and should be within a *Modus* of 2d. per acre for all meadow and mowing ground when the clover stands for seed, and a great quantity is produced.

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Note; The Court was divided; *Montague Ch. Baron* and *Atkins*, held that it should be accounted hay; *Raymond* before his removal and *Gregory* were of the contrary opinion, and afterwards *Wefson* inclined to think that it was not within the custom; but the plaintiff the day after the term

(2) It is necessary that the acorns in the season, and the owner's cattle should be gathered and sold, for if eat them, in that case no tithe shall be they drop of themselves from the trees paid of them. Lit. 40. Hest. 27.

prayed

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prayed to dismiss his bill without costs or prejudice; which was admitted.

In the case of *Pomfret* vers. *Lauder Wait & al*, 8 July 1680, Tithes of clover grafs had been thrashed and made into horse bread, and hogs had been fed with the seed, yet adjudged to be hay, and titheable to the Vicar who was endowed with hay, and not to the impropiator, as a new and different tithe from hay.

In these cases it appears that the dispute was between the impropiator and the Vicar who was endowed with tithe of hay, for the seed of *sainfoin* or clover; (for in that the reports differ) the impropiator insisted it was of the nature of corn or grain, and consequently belonged to him.

In the first case the court was divided; in the second, they inclined to think that the seed belonged to the Vicar; so that as far as the authority of these cases goes, the tithe of the seed was decreed to the Vicar; it is true that the Vicar was endowed of the tithe of hay, and the expression of some of the Judges was, That the seed should go with the stalk and should be looked upon as hay or grafs; but such expressions might well be used in favour of the Vicar, who was intitled to tithe hay, in opposition to the impropiator's claim, who would have it taken to be of the nature of corn, because horse bread was made of it, and hogs fed with it. And therefore it would be too rigid a construction of those expressions to say that they imported, That the seed should in all cases be reputed of the nature of grafs or hay, since they are apparently different; although in these particular instances where the vicar had tithe hay, they may be resembled to it, since one as well as the other belonged to him. The whole authority of these cases amounts to this; that *Sainfoin* or clover seed is not of the nature of corn or grain; in which the Court being divided in the first case, the plaintiff finding the inclination of the Court, desired to dismiss his bill without costs; which was admitted. In the second case it appears not what determination was finally made, nor does it appear what became of it in the entry of the deputy remembrancer; whether

whether it was properly great or small tithes was not at all under the consideration of the Court; and by the cases before cited it seems most reasonable to account it of the nature of small tithe.

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But in the present case it seems most evident that it should be so taken, since by the depositions in the cause it appears, that for 40 or 50 years in this parish the Vicars have received the tithe of this seed; and although the impropriator hath frequently hired the vicarial tithes, yet it was rarely, if ever, taken by him when he did not hold both.

And all the Barons agreed in opinion, that the plaintiff's bill should be dismissed with costs.

Baron *Parker* seemed to doubt of the first point, because of the expression in the cases cited, that the seed and stalk should go together. (3)

(3) It has also been decreed, since this case, that the seed of clover is a small tithe. Bunb. 344.

D E

Termino Pasch.

12 Geo. II.

Case 270.

The Aldermen and Burgesſes of Bury St. Edmund and Lawrence Wright, Plaintiffs,
verſ. Lewis Evans, Defendant. In Scacc.

Preſcription in
non decimando
 even againſt a lay
 impropriator,
 was holden not
 good.
 Bunb. 345.
 S. C.

A BILL for ſmall tiſhes was brought by the plaintiffs ſetting forth, That King *James* the Firſt was ſeiſed in fee of the rectories and vicarages impropriate of the pariſhes of St. *Mary* and St. *James* in *St. Edmund's Bury* in the county of *Suffolk*, and of all tiſhes great and ſmall belonging to the ſaid rectories and vicarages, formerly part of the poſſeſſions of the monaſtery of *Bury St. Edmund in com. Suffolk*.

That being ſo ſeiſed, by letters patent dated the 1ſt of *July* 6 *Jac.* the King granted to the Aldermen and Burgeſſes of *Bury St. Edmund*, and their ſucceſſors, (*inter al.*) *Decimas tritici, garbar. lanæ, vitulor. &c. & omnes & ominimodas decimas diſt. monaſterio ſpectan. tam majores quam minores.*

And afterwards by letters patent dated the 17th of *September* 12 *Jac.* the King granted to the ſaid Aldermen and Burgeſſes, and their heirs and ſucceſſors, (*inter al.*) the rectories of St. *Mary* and St. *James*, and the vicarages of the ſame churches, the advowſons, rights of patronage, &c. *Ac omnes & omnimod. decimas tam majores quam minores, prædial. mixtas*

tas & minutas, to the said churches, &c. *dicto monasterio* BURY CORP. of
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speciatim.

That by indenture dated the 2d of *April* 1724. the Aldermen and Burgeſſes of *Bury* made a lease to the other plaintiff *Wright*, of all their tithes of corn and grain, arising within the said town of *Bury*, in the said parishes of *St. Mary* and *St. James*, for the term of eleven years.

And afterwards, taking notice that by the said lease the tithes of corn and grain only were demised, and the small tithes in the said parishes by mistake were omitted; although they were intended to have been leased, and the plaintiff *Wright* the lessee ought in conscience to enjoy them; it was by an order of council entered in the council-books of the corporation, agreed, that a bill should be exhibited in the name of the corporation, or *Wright*, or both, for the recovery of the said small tithes due from the defendant and others for lands by them held in the said parishes, and on such recovery, satisfaction should be made for the same to the plaintiff *Wright*; that the defendant *Lewis Evans*, from the year 1724. to the year 1734. held several lands within the said parishes in the town of *Bury*, particularly 184 acres part of a farm called *Eldo Farm*, or the Old Farm, which farm for the greatest part lay in the parish of *Ruffham*, and only 184. acres part of it lay in the parish of *St. Mary*, which farm was parcel of the possessions belonging to the monastery of *Bury St. Edmund* in the county of *Suffolk*; that the defendant *Evans* likewise held in the said parish of *St. Mary* during the said years several lands called *Wood Went*, containing about ninety-four acres, and other lands containing about thirty-six acres, and other lands about nine acres, on which were arising yearly great quantities of corn, hay, clover-seed, turnips, and other small tithes; whereby the said Aldermen and Burgeſſes, or the said *Wright*, became entitled to demand the said tithes; and pray, that the defendant may shew cause why the defendant should not make satisfaction for the same to the said *Wright*; the said Aldermen and Burgeſſes consenting that he

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should receive the same; and that the plaintiffs may have such relief in the premises as the nature of their case in equity and good conscience doth require.

To this bill the defendant answers, and admits, that he hath held the several lands in the bill mentioned during the time charged, particularly the said 184 acres, parcel of *Eldo Farm*; or Old Farm, which was part of the possessions belonging to the Monastery of *Bury St. Edmund*, and the lands called *Wood Went*, and the said thirty-six acres and nine acres in the parish of *St. Mary*, and believes that the several kinds of tithes and quantities mentioned in the bill might be arising in the said several years, but insists, that he hath paid and satisfied to the plaintiff *Wright* for all the tithes of corn and grain growing in the said years; but that no small tithes were ever paid or demanded for the said lands; and doth insist, that, as no small tithes, or any satisfaction or composition for the same, were ever paid by or demanded from the defendant, or any persons under whom he claims, in respect of the said lands, or from any other owners or occupiers of lands in the said town of *Bury*, after such a length of time and so long an enjoyment of lands freed and discharged from small tithes, a legal discharge is to be presumed; and it must be necessarily intended that the small tithes by due course of law were aliened or released to the owners of the said lands by the persons intitled to the inheritance of the said small tithes, though the conveyance or release, or other legal discharge be lost or destroyed, especially since the small tithes in the said parish of *St. Mary* are of equal value with the great tithes arising there.

This cause coming on to be heard on *Thursday* the 17th of *May* 1739. the plaintiffs produced the said letters patent 6 & 12 *Jac.* the lease and order of council, and by depositions of *Charles Woodward* and *Francis Wright* (all which were read) proved that 40 or 50 years since they held lands for many years in *Bury*, or collected the tithes there, and that small tithes were paid by several persons in the said parish of *St. Mary* and *St. James*; and they had heard their fathers (who held

held land 40 years there before their having land there) and one *Richard Copsy* deceased, declare that small tithes in the said parish ought to be paid or compounded for.

On the part of the defendant it was proved by the depositions of several witnesses, that 48 or 50 years before they gathered corn in the said parish, and never knew any small tithes paid or demanded.

On this case it was first insisted by Mr. *Boote* and Mr. *Starkey* of counsel with the defendant, that the bill was not proper which demands satisfaction for small tithes to the plaintiff *Wright*, who had no lease of or title to them. *Sed non allocatur*; for the plaintiffs shew the title of the Corporation to great and small tithes, the lease of the great tithes to the plaintiff *Wright*, and their intention that he should have the small tithes; and then conclude, that the Corporation or he are entitled to such small tithes; and then pray that the defendant may shew cause why he should not make satisfaction to him for the small tithes arising on his lands, the Corporation consenting that he should have them; and they pray general relief as the nature of the case requires, so that the Court may consistently with the prayer of the bill direct the defendant to account to the plaintiff *Wright* for his great tithes not satisfied, and to account to the Corporation for the small tithes which are not comprehended in their lease to him, and to which therefore the Corporation continues entitled, notwithstanding it is prayed that the defendant should shew cause why he should not make satisfaction for them to *Wright*, they consenting that he should have that satisfaction.

Then it was insisted by the counsel for the defendant, that since there was no proof of any small tithes being ever paid by the defendant, (although it was proved by *Richard Micklesfield* that 2 s. had been demanded *per acre* for the small tithes of the lands which he held, part of *Eldo* or Old Farm, and he offered 18d. *per acre*, but afterwards he refused to pay it); and that it was proved by several witnesses that

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they never knew small tithes paid for, and that the small tithes were more in value than the great tithes in that parish; it was insisted,

That in the case of a lay impropiator, the defendant might say in bar of the demand of tithes, that no tithes had ever been paid or demanded for these lands.

It is true in the case of a rector or spiritual person, no one can prescribe against him in a *Non decimando*; but otherwise it is in the case of a lay impropiator.

And the reason given in the Bishop of *Winchester's* case, 2 Co. 44. (that if such a prescription should hold in the case of a spiritual person, a jury of lay gentlemen would not be equal in the trial of such prescription) fails in the case of lay impropiators.

(a) Bunb. 284. And although there was no express determination in the point by this Court, yet many Judges were of that opinion; in the case of *Benson (a)* and *Olive* in this Court, where the bill was by a lay impropiator, the Chief Baron and another Baron were of that opinion; indeed when it was spoken to in 1727 and 1730. the Court was divided in opinion, and so no decree was made.

In the case of *Meadly* and *Tomlins*, Pasch. 7 W. 3. the bill was by a lessee of the Dean and Canons of *Windfor*, and in the case of *Talbot* *vers.* *Samon, Harding & al.* in 1736. the plaintiff was a lessee of the Bishop of *Litchfield* and *Coventry*, the Court determined not the matter by allowing the prescription alledged, because they were in effect ecclesiastical persons, being lessees for years to such as were spiritual persons.

And in this case, though there was proof of payment of small tithes by the inhabitants of *St. Mary's*, yet none were paid by the defendant; one witness indeed said that he had promised to pay for the tithes of clover-seed, but he might apprehend that to be a great tithe before the determination of the Court in the case of *Wallis (b)* and *Pain*; and though he

once offered to pay 18*d.* in the pound when two shillings were insisted on, upon better thought afterwards he refused to pay it.

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And the Court being earnestly desired to consider the case, and it being a matter which might frequently come before the Court, they took time to think of it till next term; and in *Trinity* Term the Chief Baron delivered the opinion of the Court to the effect following.

The matter for the determination of the Court may be considered under two heads:

First, Whether a layman can prescribe in a *Non decimando* against a lay impropriator.

Secondly, Whether the defendant hath made out a case which may entitle him to the benefit of such a prescription.

And in both these points the opinion of the Court was for the plaintiff.

As to the first question, they think that there is no foundation for such a distinction, that the defendant may prescribe against a lay impropriator any more than against an ecclesiastical person; which it is admitted he cannot. For,

First, No such distinction appears in any law book whatsoever; the rule is laid down generally, that a layman cannot prescribe in a *Non decimando*, but in *Modo decimandi* he may; this is said by *Choke* so long ago as 8 *Edw.* 4. 14.; this is expressly resolved in the Bishop of *Winchester's* case, 2 *Co.* 44. & *Rel. Abr.* 653.

The same is agreed in several other cases, namely, in the case of *Wright* vers. *Gerrard*, *Hob.* (a) 306. *Mo.* 425. and (b) 2 *Keb.* 28. 60.

(a) 1 *Jon.* 24
Cro. Jac. 607.

S. C.

(b) 1 *Lev.* 189.

1 *Sid.* 320.

(c) *Noy.* 97.

2 *Rel. Rep.* 250.

1 *Jon.* 6. S. C.

And in the case of *Slade* and *Drake*, (c) *Hob.* 297. it is largely descanted upon, and agreed by Lord Chief Justice *Hobart* to be a settled principle of law.

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So *Selden* in his History of Tithes, *cb.* 13. 3 *vol.* *f.* 1279. who was not thought averse to the privileges of laymen in the enjoyment of tithes, after an account given of the infeodations of tithes to laymen, which by the laws of *France* and *Spain* were still allowed, concludes that infeodations were in *England* as in other states, but of later times none are allowable, derived from any other original than the statute of dissolutions; that discharge by prescription of paying no tithes, or any thing in lieu of them, by the later canon law, since the parochial right established, is allowed only to spiritual persons, but to no layman, the laity being incapable of tithes by pernancy, as also of discharge by bare prescription, saving in cases within the statute 31 *H.* 8.

And the reason given in the books why a layman cannot prescribe in a *Non decimando*, is, because a layman, since the parochial right established, is incapable of tithes in pernancy; so saith Lord *Coke*, 2 *Co.* 44. as well as Mr. *Selden supra*; and consequently, as he cannot take a grant of tithes to himself unless upon a consideration paid for them, as upon a real composition by parson, patron, and ordinary, or by a *modus* given in lieu and satisfaction; so he cannot be discharged from the payment of them; for a real composition shall not be intended unless it be shewn.

It has indeed been objected, that there is no foundation for a layman to be excluded from the benefit of such a prescription, since there is no incapacity in him to take such a grant; and therefore it is hard that time, which establishes a right in other cases, should weaken his right in respect to his discharge from the payment of tithes, and consequently that he shall have no advantage from a real composition, unless he can produce it, which yet in length of time may, as well as other grants, be lost; and yet in other cases where there has been an immemorial usage to pay or to be exempt, some grant shall be presumed originally made to warrant it.

But this will not appear altogether so hard, if it be considered, that when the parochial right became established, and
tithes

tithes were the fixed and settled revenue of spiritual persons only, a grant of them to any other person was void, unless made upon a valuable consideration, so that there was *quid pro quo*; as was the case of a real composition or *modus decimandi*; it was void not from any incapacity in the grantee to take, but from the impropriety of the thing granted, which being appropriated to spiritual persons as their proper and peculiar maintenance, could not be given to a layman; that this was so, appears by an epistle of Pope Innocent the Third, in the body of the Canon Law, *lib. 3. tit. 30. ca. 29. de Dec.* where it is said, *Perceptio decimarum ad ecclesias parochiales de jure communi pertinet*; and *Lind.* speaking of portions of tithes which a parson might prescribe to have in the parish of another, saith *portiones potuerunt pervenisse ad locum religiosum de concessione laici*, &c. *de decimis vel proventibus quas laicus talis habuit ab ecclesia aliâ in feudum ab antiquo hoc verum est, si tales portiones decimarum eis donatæ fuerunt ante concilium Lateran. celebrat. Anno 1130. Temp. Alex. 3. Nam ante illud concilium potuerunt laici decimas in feudum retinere, non tamen post tempus dicti concilii.*

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And the Canon of that Council runs, *Prohibemus ne laici decimas cum animarum periculo detinentes in alias laicos possint transferre, si quis vero receperit & ecclesia non reddiderit, Christi- anâ sepulturâ privetur.* Cod. 691.

Hence it is manifest, that it was not thought that a layman was incapacitated to be the pernor of tithes, from any incapacity in his person, but from the nature of the thing granted; which being esteemed in those days as the peculiar revenue of the church, and laymen being under so severe penalties prohibited to hold them, it is no wonder that the common law, which in many instances admitted the authority of the canon law in those times, should hold the pernaney of them by a layman as unlawful.

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But since a layman may claim an exemption from payment of tithes by a real (1) composition as well as by a *modus*, why should not he prescribe to the exemption as well in one case as the other? There is a plain difference; for when he prescribes *in modo decimandi*, the compensation to the parson manifestly appears in the prescription, and if no advantage to the parson appears, the *modus* (2) is not good; but if a man should be allowed to prescribe in a *Non decimando*, without shewing any consideration at all, it would be liable to great abuse; and it is not so great an hardship for a temporal person to keep the instrument of his real composition, when he knows it necessary that he should do so, as it would be mischievous to the clergy, if that was not requisite; for a composition by a parson and a successor for some years, might soon give pretence to set up a prescriptive right.

Secondly, Another reason, why a layman should not prescribe against a lay impropiator, any more than against an ecclesiastical person, is, that because a lay impropiator must claim under a spiritual or ecclesiastical person; for every patentee of the Crown, who can lay claim to tithes, must claim it by virtue of the statute 31 H. 8. c. 13, or some other statute for the dissolution of religious houses.

(1) "By *composition real* is meant, where the present incumbent of any church, together with his patron and ordinary, do agree by deed under their hands and seals, or by fine in the King's Court, that such lands shall be freed and discharged of the payment of all manner of tithes for ever, paying some annual payment, or doing some other thing, to the ease, profit, or advantage of the parson or vicar, to whom the tithes did belong."—3 Burn's Ecc. L. 415.

(2) Dr. Burn says that "in every prescription *de modo decimandi* it is to

be intended the rate tithe was the full value of the tithe, at the time of the original composition; for it cannot be presumed (he continues) that the parson, patron, and ordinary would make a composition to the prejudice of the church; and if the *modus* do not now reach the value, it is to be intended, that either the tithes are improved, or else that money is now become of less value, which makes the present inequality." Ecc. Law, 3d. vol. p. 415.

The statute 31 H. 8. is the first act of parliament which enacted that the King and all persons who should have any manors, lands, &c. belonging to the religious houses thereby dissolved, should hold and enjoy the same freed and discharged from the payment of tithes, in as full and ample a manner, as the abbots, &c. had the same at the time of the dissolution.

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Now it is well known that none of these religious persons could be exempted from the payment of tithes but by order, the Pope's bull, composition real, prescription or unity of possession; and every patentee of the Crown, that is, every lay impropiator, must alledge a title to the tithes which he demands, by grant from the Crown of some rectory, vicarage, or other tithes, which were part of the possessions of some religious houses, which came to the Crown by that or other statutes; and therefore, as Lord *Hobart* says in *Slade and Drake's case*, f. 296. a temporal person succeeding a spiritual person in discharge, (and it is the same in the perception of tithes) it is to be reckoned in a spiritual person, and not in a temporal; and consequently a man, who could not prescribe against an ecclesiastical person, cannot any more prescribe against the patentee, who derives his title from and under him, and is in the nature of his representative.

Hob. 297.

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As to authorities in the case, it is agreed that there has not been any determination against the plaintiffs; the case of *Ben-son and Olive* was rather in favour of the plaintiff; for though the Court was divided upon the circumstances of that case about making a decree, or leaving him to law, the plaintiff brought his action on the statute 2 & 3 Ed. 6. c. 13. which was tried before the Chief Justice *Raymond*, and recovered; and the other two cases mentioned, *Meadly* and *Tomlins*, Pasch. 7 W. 3. and *Talbot and Salmon* 1736, seem authorities for the plaintiff, for there the lessee of the Dean and Canons of *Windsor*, and the lessee of the Bishop of *Coventry* and *Litchfield* (though laymen) had decrees for their tithes, although a constant non-payment was insisted on; and what difference can there be in the reason of the thing between a lay lessee and

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and a lay impropiator, if the prescription is allowable only, because he is a layman, and not an ecclesiastical person ?

There are two cases, of which my brother *Parker* hath given himself the trouble to get copies ; they may be fit to be considered on this question.

The first is the case of *Medly* and *Talmy*, *Pasch. 7 W. 3.* wherein the plaintiff, as lessee of the rectory of *Leominster in com. Suffex*, exhibited his bill against the defendant for tithes of corn and grain growing on his lands in the said parish, and suggesting, that the defendant pretending his lands were exempted from the payment of tithes, refused to discover how they were so discharged. The defendant by his answer insists, That his father in the year 1652 purchased the lands in the defendant's occupation of one *William Cooper* of *Maidstone in Kent*, which in the purchase deeds were mentioned to be free from the payment of tithes, and conveyed as such, but the antient deeds are lost or mislaid, so that he cannot set forth by what ways or means they are exempt. The cause came on to be heard before Chief Baron *Ward* and Judge *Litt. Powis*, then Baron ; on reading the purchase deed of 1652, a great debate arose, and the Court did not think fit to decree for the plaintiff without a trial ; and proposed that an action should be brought on the statute 2 *Edw. 6.* which the plaintiff declining, the bill was dismissed by consent without costs.

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It is probable that the defendant had a legal exemption, which the plaintiff was conscious of, but thought to take advantage of the loss of the defendant's deeds, whereby he was disabled to make it out ; but the Court not favouring his design, chose to dismiss his bill without costs.

The second case my brother *Parker* hath copied out, was *The Mayor, Aldermen, and Burgeffes of Warwick* against *Lucas*, *Trin. 9 Anna*, and heard on the 5th of *July 1710.* The plaintiffs sued as impropiators of the rectory of *St. Mary in Warwick* for the tithes of two closes called the *Upper Fryers* ;
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the defendant admitted the plaintiffs to be entitled to all rectorial tithes in the parish except those two closes, which he insists were the site of the mansion-house of the late dissolved Friars preachers in the town of *Warwick*, which came to the Crown by the dissolution of the said House, and were freed from the payment of tithes by virtue of some prescription, bull, order, or other lawful means, and had ever since been holden free from payment of tithes to the rector or vicar; and that the monastery being a spiritual corporation was capable of being discharged by prescription. And upon debate the bill was dismissed by the Court with the plaintiff's consent, with moderate costs.

In these two cases it does not indeed appear directly, whether the defendants could make out a legal discharge or not; it was probable that they could, and the plaintiffs thought it so probable that they cared not to try that point, but consented that the bills should be dismissed; but they are far from shewing the opinion of the Court, that a bare prescription could be set up against a lay impropiator any more than an ecclesiastical person; for if so, the bills ought to have been dismissed with costs without more ado. But as where an ecclesiastical person sues, if the defendant has a probable ground of discharge, it is not proper to decree against it, without putting it in a way of examination, which the Court seemed willing to do in these cases; but the respective plaintiffs, doubtful of the issue, chose rather that the bills should be dismissed.

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But for the clearer illustration of this point, it may not be improper to consider in what cases a defendant may be discharged by prescription, and in what not.

Where any man occupies lands which came to the Crown by the dissolution of religious houses by virtue of the statute 31 H. 8. c. 13. or of the statute 32 H. 8. c. 24. it is manifest that he may insist on a discharge by prescription; for since the religious houses dissolved by those statutes (being ecclesiastical bodies) were capable of a discharge by bull, order,

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or prescription, the patentees of any part of the possessions belonging to any of those houses, are enabled by a special clause in the acts to enjoy the same acquitted and discharged of the payment of tithes, in as full and ample a manner as the ecclesiastical persons enjoyed them at the time of such dissolution, &c.

And by the statute 2 Ed. 6. c. 13. no person shall be compelled to pay tithes for any lands, &c. which by the laws and statutes of the realm, or by any privilege or prescription are not chargeable with the payment of them.

Hardr. 315.

Secondly, A spiritual person, or the King who is *Persona Sacra*, being capable of tithes in perannuity, is capable of prescribing to be discharged of the payment of tithes.

That a spiritual or ecclesiastical person may so prescribe is resolved in the Bishop of *Winchester's* case, 2 Co. 44. *Cro. El.* 511. (a) S. C. So it is in *Richard* Bishop of *Lincoln's* case, *Cro. Eliz.* 216. (b) 1 *Roll. Rep.* 264. *Mo.* 618. *Yelv.* 2. S. C. *Cro. Eliz.* 785. S. C. 1 *Jon.* 368. (c)

(a) *Cro. Eliz.*
475.
Moore. 425.
S. C.
(b) 1 *Leon.*
248. S. C.
(c) 1 *Roll. Abr.* 654. *Cro. Car.* 422. S. C.

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(d) *Cro. Eliz.*
399. S. C.

That the King may likewise prescribe in a *Non decimando* appears 22 *Aff.* 25. 10 *H.* 7. 18. *Mo.* 483. (d) *Sti.* 137. 1 *Jon.* 387. *Het.* 60. and in many other books.

But I know not that it has been allowed in any other cases.

It was insisted on in the case of *Sidowne* and *Holme*, *Cro. Car.* 422. 1 *Jon.* 368. 1 *Roll. Ab.* 654.

The plaintiff in prohibition surmised that the Prior of *Bristol* was seised in fee of lands in his possession, and that he and his predecessors time out of mind, till the dissolution of the priory by the statute 27 *H.* 8. held them discharged of the payment of tithes, and by patent the lands came to *Edward Battel*, and to the plaintiff as his lessee; and it was insisted that the prior being capable of tithes and of being discharged by prescription, the plaintiff ought to have the benefit
of

of the discharge; but by three Judges it was resolved, That the prior being capable of a discharge by privilege as well as by grant or composition, it shall not be intended to be a discharge by composition, but rather by privilege, which was the general course of exemption, which privilege was gone by the dissolution, and consequently the plaintiff ought to pay tithes; and a consultation was awarded.

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And *Roll* said that it had been so resolved 7 *Car.* in the Exchequer, and in another case 11 *Car.* by the same three Judges.

The like resolution was in the case of *Wright* vers. *Gerard*, *Hob.* 306. 1 *Jon.* 2. where the plaintiff insisted upon a discharge by unity of possession of a farm called *Downhall* and of the rectory impropriate of the same parish, both which came to the Crown by the statute 27 *H.* 8. and the plaintiff claimed the farm, as the impropriator did the rectory, by grant from the Crown; but a consultation was granted.

The like resolution was in the case of *Bowles* and *Atkins*, 1 *Lev.* 185. 1 *Sid.* 320. 2 *Keb.* 28. 60. 162. 175. where an action of debt was brought on the statute 2 *Ed.* 6. c. 13. against the lessee of *All-Souls* college, who insisted, that the prior of *Abingdon* and his predecessors held the lands time out of mind, or discharged of tithes till their alienation to the college of *All-Souls*; but it was unanimously agreed by the whole Court, that the college being a temporal corporation could not prescribe in a *Non decimando*. And it was said in that case, that this point had been resolved in the case of *Sidoun* and *Holmes* which was considered as good law in all the Courts of *Westminster*.

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These are so many determinations in the matter in question, and much stronger than the present case; and it appears, that no difference was made between a lay impropriator and a spiritual person; for the ground and reason why such prescription is not good, is not in respect of the person

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person against whom the prescription is alledged, but in respect of the person prescribing; because a layman is not capable so to prescribe, though an ecclesiastical person may.

And this is confirmed by all those cases where a *Modus* is insisted on for the discharge of the tithe of hay, corn, &c. because it is spent for the fodder of their cattle, the maintenance of their family, &c. which was always disallowed, because it amounts to a prescription in a *Non decimando*. *Mo.* 683. And such *Modus* was disallowed for the same reason, as well where Sir *H. Warner* a lay impropiator libelled for the tithes, as where the parson of the parish sued for them; and after an argument at bar a consultation was granted, because none can prescribe in a *Non decimando*. 2 *Cro.* 47. And many cases might be cited to the same purpose.

Hardr. 325.

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So where the King prescribes to be discharged of the payment of tithes (as he may) his patentee being a lay person cannot do so; as was resolved 11 *Car.* where in a prohibition the plaintiff declared, that King *Edward* the 6th. was seized in fee of the forest of *Savanach* in *Com' Wilts.* and twenty acres of wood, parcel of the same forest, and held the same time out of mind discharged of the payment of tithes, and granted them to the Duke of *Somerset*, and by mesne conveyances the twenty acres of wood came to the plaintiff, whom the defendant sued for tithes. The defendant pleaded, that the twenty acres were not parcel of the forest, and afterwards by verdict it was found that they were. But it was resolved, that the alienage of the King could not have advantage of this prescription in a *Non decimando*; for a real composition or other consideration for such discharge shall not be intended, without shewing it specially, and then the grantee of the Crown cannot be discharged. 1 *Rel. Ab.* 655. 1 *Jon.* 387. *Stile* 137. And in case the grantee of the King cannot prescribe in a *Non decimando*, although he claims under the Crown, which was exempt by prescription from the payment of tithes, it may be

be justly inferred, that he cannot do so in any other case; and that the law will not allow any person to prescribe in that manner, unless it be a person ecclesiastical or sacred, as the King is, who was enabled to hold tithes in pernancy, or unless he be within the exemption created by the statute 31 H. 8. or 32 H. 8.

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By the words of the answer it looks as if some stress was laid upon the parish being exempt in this case; for the answer says, that no small tithes, or any satisfaction or composition for the same, were ever paid by or demanded from the defendant, or any under whom he claims, or from any other owners or occupiers of lands within the town of *Bury St. Edmund*; but the counsel for the defendant did not insist upon this, nor indeed could they with any colour do so; for besides, that it appears by the depositions in the cause, that small tithes had been paid by several inhabitants there, it was resolved in the case of *Hicks and Woodson, T. 6 W. & M. 4 Mod. (a) 336. Carth. 392. 2 Salk. 655. Skin. 560.* that a custom to be exempt from the payment of tithes could not be alledged in an hundred, much less in a parish; but it must be in a county or in *Pair*, such as the wild of *Kent*; and there only for things not due of common right, as for wood, &c. And therefore custom alledged in the hundred of *Huntsfil* to be free from tithes for the agistment of barren cattle, was after a verdict for the plaintiff, which found the custom, holden to be a void custom, and a consultation was awarded, which was a farther authority in confirmation of the general maxim of law, that a layman cannot prescribe in a *Non decimando*.

(a) 12 Mod.
111.
Comb. 403.
Holt 671.
1 Ld. Raym.
137.
3 Ld. Raym.
116. S. C.

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Thirdly, Another reason may be given for the disallowing of the defence set up for the defendant in the present case, in that the defendant does not alledge any particular ground of discharge, but only saith, That no small tithes were ever paid or demanded for his lands; and therefore after such a length of time, and so long an enjoyment of lands free from payment of tithes, a legal discharge must be presumed,

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and it must necessarily be intended that the small tithes were aliened or released to the owners of the land by the persons intitled to the inheritance, though the conveyance or release or other legal discharge be lost or destroyed.

I agree, that in courts of equity the same formality is not required as in pleadings at law, but the substance of the matter alledged for the exemption of the defendant ought to be shewn with so much certainty at least, as the Court may see what is insisted on, and direct the same to be tried or examined. In case a prescription is relied upon, the defendant ought to alledge the prescription in such a manner as that it may be tried. In this case the defendant does not so much as say, that he is excused by prescription, he says indeed no small tithes were ever paid or demanded, which may be evidence of a prescription; but in all cases where a prescriptive right is insisted on, that is the matter which must be tried; and can the Court direct a trial of what is not alledged, or where that only is alledged, which may be some proof of it, or whence it may be inferred? Much less, whether any legal discharge generally, or whether any conveyance, release or other legal discharge; an issue must be upon a single point, not a matter complicated, confused or multifarious. *Co. Lit.* 303.

(a) 2 Browne
25. S. C.

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In the case of (a) *Priddle and Napper*, 11 Co. 9. where the defendant in prohibition traversed the prescription alledged, instead of the unity of possession, which was the ground (if any) upon which the plaintiff had to excuse himself from the payment of tithes, it was holden to be ill; for he ought to have traversed the unity, *ratione*, &c. as he was discharged, and consequently his plea was insufficient.

In *Slade and Drake's* case, *Hob.* 295. it is said, That the discharge of tithes being against common right, he must plead it with its ground and reason specially; it is true a spiritual person being capable of a discharge by prescription, might alledge the prescription generally, without assigning any

any reason for such discharge; but here is no prescription directly insisted on, which could be sent to a trial.

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Many cases might be cited to shew the impropriety of such pleadings, but it is less needful, since the matter, if it had been more properly insisted on, had been insufficient. Polluxen. 9.

The second question, Whether by any thing else appearing in the case, the defendant may excuse himself from the payment of tithes; for it was urged, that there being an unity of possession in the Abbot who had the rectory and *Eldo Farm* in fee, and consequently that the defendant ought not to be charged for the small tithes of 184 acres, part of that farm; but how does this unity of possession appear? All the proof offered for it, is, that the plaintiff makes title to the rectory and vicarage of *St. Mary*, and of all tithes predial, mixt and minute, *Monasterio de Bury St. Edmund nuper spectant*; that by a roll out of the augmentation office, it is said that on the 4th of *November* in the 31st *H. 8.* the Abbot and convent of *Bury* surrendered to the King the monastery and church of *Bury*, and all manors, messuages, lands, tithes, rectories, vicarages, &c. belonging to the said monastery. That on the 10th of *July* in the 37th *H. 8.* the Duke of *Norfolk* accounted to the Crown for the manor of *Old Haw*, *Hoe* and *Rustham*, part of the possessions of the monastery of *Bury St. Edmund*, resigned to the King, and by him granted to the Duke of *Norfolk*, and valued at 21*l.* 17*s.* 4*d.* per *Ann.*

Now it does not appear that *Eldo Farm* was part of the manor of *Old Haw*, nor is it so much as averred by the answer; there is nothing to induce a probability of it, but an imagination that *Eldo* may be a corruption of *Old Haw*, which is a thing merely imaginary and destitute of all proof; but admitting that it really was; not only that ought to have been expressly alledged in the answer, but it ought likewise to have been shewn that the Abbot and convent had been seised of the rectory and lands *simul ut semel* time out of mind, and continued so seised till the time of the

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Pollex. 3.
Hidr. 190.

dissolution; for according to *Priddle* and *Napper's case*, 11 Co. 14. b. every unity which amounts to a discharge from the payment of tithes, by virtue of the statute 31 H. 8. ought to have four qualities. It ought to be rightful, and not commence by wrong. 2. It ought to be equal, that is, the Abbot and convent ought to be seised of the rectory and land both in fee. 3. It ought to be perpetual, having continuance time out of mind. 4. It ought to be constantly free from payment; for if the tenants for years or will under the Abbot and convent ever used to pay tithes, the unity will not avail.

And Lord *Hobart* adds a fifth quality; it must have constant continuance in the same body, else it is of no force. *Wright* and *Gerrard*, *Hob.* 310, 311.

And the same qualifications have been agreed and confirmed by many subsequent resolutions and authorities.

Now if the defendant had by his answer insisted, that there had been such an unity of possession in the Abbot and convent of the rectory or vicarage of St. *Mary* and of *Eldo Farm*, the plaintiff might have been able to prove that *Eldo* and *Old Haw* were not the same estate; that *Eldo Farm* was never in the abbey and convent; nor does the defendant insist or make out, that he derives his title to that farm under the Duke of *Norfolk*; that the rectory was appropriate within time of memory; that the lessees paid tithes, or that the estate was in lease at the time of the dissolution; in which cases these lands would not be discharged by the statute. Vide *Cro. Eliz.* 584. *Mo.* 528. 2 *Bul.* 65, 66. (a) 1 *Jon.* 412. And for these reasons the Court decreed that the defendant should account for the several matters prayed by the bill. (3)

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(a) *Cro. Jac.*
18. S. C.

(3) *Reynolds* Chief Baron declared it as his opinion, in the case of *Charlton v. Charlton*, reported in *Bunb.* p. 325. That there could be no prescription in *Non decimando* against a lay rector, any more than against a spiri-

tual rector, and that they were equally entitled to tithes of common right; and that it was sufficient for a lay rector to set forth in a bill that he was seised of the impropriate rectory; and if he made out his title to that, it would

Jones & Ux' *vers.* Meredith & al'. In Case 271.
Scacc'.

IN ——— term ——— Geo. 2. the complainants exhibited their bill, setting forth that *Giles Meredith* died seised of certain lands above 100*l.* *per ann.* in Com' *Monmouth*, leaving issue only one son *Giles Meredith*, and three daughters, *Catherine*, *Cicely* and *Mary* since married to *William Watkins*, who are the defendants; and the plaintiff having married *Mary* the only sister, and who on failure of issue of the said *Giles Meredith* the father, is his heir at law; that *Giles* the son entered and died seised in *October* 1736; that his sisters *Catherine*, *Cicely* and *Mary* were educated in the popish religion, whereby the plaintiff *Mary*, their aunt, being the next protestant kin, is intitled to enjoy the rents and profits of the estate by virtue of the statute, until the defendants take the oaths and conform.

A mortgage by a Popish heir may be redeemed by the next protestant kin. 3 Eq. Abr. 379. pl. 12. Bunb. 346. S. C.

That the plaintiffs hereon brought an action of ejectment in the Court of Common Pleas in *Hil.* Term last; but *Roberts* another defendant caused himself to be added a defendant in the said estate, and insisted on a mortgage of the said estate, made to him by the other defendants for a term of years for the security of 400*l.*

Therefore the bill prays a discovery whether *Giles Meredith*, the father and son, did not die seised, and when; that *Roberts* may discover whether *Catherine*, *Cicely* and *Mary* were not educated in the popish religion, and now profess

would be sufficient, without putting him to the proof of having received tithes. *Pengelly* Chief Baron maintained the same opinion respecting the proof of the payment of tithes in the case of *Benson v. Olive*, Bunb. 284. Baron *Comyns*, in the former case, distinguished between one who set up a

title to a *rectory*, and one who intitled himself only to the tithes, or any species of tithes within the parish; for in the latter instance, he declared, that the plaintiff must be holden to strict proof not only of his title, but also of the perception of all the tithes to which he set up a title. Bunb. p. 325.

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it; and whether they were not of the age of eighteen years and six months at the death of *Giles* the son, or of what age; and whether they have not refused or declined the said oaths, and are thereby incapacitated to hold the said estate; whether the plaintiff *Mary* is not the next protestant kin, and what incumbrance he has; and that the plaintiffs may redeem, &c. But at the beginning of the prayer it asks, that all the confederates may answer the premisses (which comprehends all repeated in the praying past) as fully as if repeated and interrogated.

Catherine and *Cicely* the two unmarried defendants, as to such part of the bill as prays to be let into the possession of two thirds of the estate, or that the plaintiffs may redeem, or seek other relief, demur. As to such part as prays that these defendants should discover whether the said defendants were educated in the popish religion, or now profess the same, or at the death of *Giles Meredith* the son, were eighteen years of age and six months, or of what age, or whether they have refused or declined the oaths in the statute 11 & 12 W. 3. c. 4. sec. 4. and thereby incurred the incapacities of that act, and whether the plaintiff *Mary* is not their next of kin, they plead the statute 11 & 12 W. 3. c. 4.; and as to the rest of the bill they answer,

The defendants *Watkins* and his wife put in the like demurrer and plea.

It was insisted on by Mr. *Wilbraham* and Mr. *Murray* for the defendants, that the demurrer and pleas of all the defendants were good, and ought to be allowed.

First, As to the demurrer by *Catherine* and *Cicely Meredith*, the unmarried sisters of *Giles Meredith* the son, it was urged, that this was a case wherein equity would not interpose; that by the statute 11 & 12 W. 3. c. 4. in case a person educated in the popish religion do not take the oaths and subscribe the declaration mentioned in the act, he is disabled to inherit or take any lands; and the next protestant of kin may hold and enjoy them, without accounting

ing for the profits, till he does take the oaths and subscribe such declaration; so that a severe penalty is put upon the party, the forfeiture of all his lands; and it is not usual for a court of equity to aid a penal law, or enforce it, or carry it further than the law will carry it; if the plaintiffs have a right to the land, they may recover it at law, but if they have no title at law, this Court will not give them one; it is more properly the business of a court of equity to relieve against a penalty than to assist the recovery of it.

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Secondly, The bill prays that the plaintiffs may redeem the mortgage, but they are not intitled to redemption; none can redeem but the mortgagor himself, his heir or assignee, or some incumbrancer who has a lien upon the estate. A man makes a bond to *B.* for money lent, and dies, and his heir assigns the equity of redemption, *B.* cannot redeem till he has obtained judgment upon the bond against the heir, 1 *Eq. Abr.* 315.

Thirdly, None can redeem but he who has a right to the estate in the land; but the plaintiff has not the estate in the land, that still remains in the defendants; all that the plaintiff can pretend to, is a perception of the profits during the incapacity, which is a mere chattel interest, which gives no right to the land itself; and indeed the defendants have the right of redemption in them. In the case of *Loman and Bird*, 1 *Vent.* 182. where the heir general of the mortgagor preferred a bill to redeem, the defendant in his answer set forth a deed of intail, whereby the estate was intailed to another; the plaintiff offered to redeem at his peril, but the Court would not permit it, unless he could shew that the intail was docked.

Fourthly, It would introduce great inconveniencies if the plaintiff should be allowed to redeem, for the estate would become irredeemable; for the plaintiff standing in the place of the mortgagor, if he be capable to redeem, and having the mortgage assigned to him, the same person would be both mortgagor and mortgagee, and he could not redeem himself.

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Besides, the Protestant kin would be answerable for waste, but as a mortgagee he could not be sued for waste; and who shall pay the interest? Shall the plaintiffs have the rents and profits, and let the interest run in arrear?

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Supra, p. 352.
Hard. 137.

As to the plea it was insisted, that the defendants were not obliged to discover what might subject them to a penalty; for when a bill prays a discovery of what might be dangerous to the party discovering, he may take either method, to demur or to plead to that part of the bill; in this case the defendants have pleaded the statute 11 & 12 W. 3. c. 4. to shew that nothing is denied to be answered by the defendants, but what would endanger their incurring the penalties inflicted by that act.

In case a bill be for a discovery, whether the defendant has set forth his great tithes pursuant to the statute 2 & 3 Ed. 6. c. 13. which subjects him to the forfeiture of the treble value, in case he hath not done so, the defendant is not obliged to answer, unless the plaintiff waives the penalty, and agrees to accept the single value only (a). *Hard. 137. 138.*

(a) 1 Eq. Abr.
75. S. C.

And there in the case of *The Attorney General* vers. *Mico*, where a bill was to discover whether the defendant did not conceal the customs and excise upon 260 casks of currants imported, and had endeavoured to corrupt the custom-house officers by promising 40*l.* reward to conceal it, on a demurrer by the defendant the Court inclined to think that he should not be compelled to make a discovery, unless the Attorney General waved the proceeding for all forfeitures. *Hard. 201.*

On a bill to discover what waste the defendant had done, a demurrer to it was allowed. (b). *Attorney General* vers. *Vincent*.

(b) Bunb. 192.
2 Eq. Abr. 378.
pl. 9.

So on a bill to discover a marriage, where a devise was to the defendant *durante viduitate*, which by her marriage would be lost, the defendant demurred, and the demurrer was allowed. *Monnins* and *Monnins* (c), 2 *Ch. R.* 68.

(c) 1 Eq. Abr.
40. pl. 4. 77.
pl. 10.

In many cases, acts of parliament have by particular clauses provided, That the defendants might be put to make discovery of matters in which they are concerned, upon their oaths, which seems to admit that they would not otherways have been liable to make such discovery; for if they had, there had been no need of such a provision; as by the statute 12 *Anne* c. 14. s. 5. it is enacted, that on a *Quare impedit* brought by the University for the benefice of any popish recusant, the Court may examine the patron or clerk contesting the right of presentment in open Court, or by commission or affidavit, in order to discover any secret trust, fraud, or practice relating to such presentation.

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So by the statute 1 *Geo. c. 55. s. 1.* which obliges papists to register their estates, it is enacted, That persons suing for penalties may by bill in Chancery demand a discovery, to which no plea or demurrer shall be allowed.

And at the sittings in Chancery after Trinity Term in 1637. in the case of *Smith* and *Read* (a), it was determined by Lord *Hardwicke*, Chancellor, That the defendant was not obliged to discover by answer, whether he was a papist or not; in that case, on the marriage of Mrs. *Pain* with Mr. *Smith*, a settlement was made to the use of the husband and wife for their lives, and after to the first and other sons of that marriage in tail; remainder to Mrs. *Pain* in fee, who devised it to the defendant; and the bill was to discover if the deviser was not a papist, in which case the devise would be void; and on plea to this bill, the Lord Chancellor held, that the defendant was not obliged to answer, which is an authority in point; for that was rather stronger, it being insisted upon that the defendant was not required to answer with respect to himself, but only in respect to the person under whom he claimed; but it was insisted that it was a penal law, and that the answer would subject the party to the penalty.

(a) 2 Eq. Abr.
378. pl. 10.
626. pl. 27.
1 Atk. 526.
infra, p. 673.

As to the case, with respect to *Jones* against *Watkins* and his wife, there is more ground for the allowance of the demurrer as well as of the plea; the plea stands upon the same
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foot with the former; but as to the demurrer, besides what was alledged for the support of the former demurrer, it was insisted, that here was no colour for the bill against *Watkins* and his wife, since here was no title made for the plaintiff to demand the possession, or the rents and profits of that share or property of this estate that belonged to the wife of *William Watkins*, who is not alledged to be educated in, or to profess the Popish religion, and consequently must be intended to be a Protestant.

And if the said *William Watkins* be a Protestant, then the question will be, Whether if a Papist seised of an estate in fee of lands and tenements marry a Protestant, the next of kin to the wife can take the possession of the estate out of the hands of the Protestant husband; for by the statute 11 & 12 W. 3. c. 4. the Papist is disabled in respect of himself only; but when a Papist marries, the husband becomes seised in right of his wife, and consequently the estate is vested wholly in him, and he has done nothing to forfeit it; besides, the husband may be said to be next of kin to his wife, there is an alliance and affinity betwixt them; and the next of kin, within the meaning of this law, is not the next of blood or the next in course of descent, and therefore the father may take before the uncle, and the brother of the half blood before the sister of the whole.

Besides, the intention of the act to prevent the growth of Popery, is as well answered by the Papist marrying a Protestant, as by selling the estate to a Protestant, for such marriage may be a means of bringing over the family to the Protestant religion.

In answer, it was urged by Mr. *Bunbury* and Mr. *Bootle*, that if the demurrer in this case was allowed, the Act of Parliament would be eluded, for every Papist would mortgage his estate, and the Protestant kin would be defeated without remedy.

The demurrer is to the whole relief prayed, and surely the next of kin may redeem; he is a kind of purchaser under the

act, and stands in the place of the heir; and though it is said to be a penal law, yet the bill is not to obtain a penalty, but to be relieved against a fraud in setting up this mortgage. A bill by the next Protestant kin to account for the rents and profits was allowed in the case of *Winter* vers. *Birmingham*, 9 Mod. 146. (a)

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(a) 2 Eq. Abr.
624. pl. 19. S.C.

As to the plea, that is ill; for the bill does not pray that they should discover whether Papists or not, but that the other defendant *Roberts* should do so; besides it goes to the discovery, which surely they may be asked.

As to the demurrer by *Watkins* and his wife, her disability is not removed by her marriage, nor is the husband sole seised; the pleading is, the husband and wife are seised in right of the wife; besides the demurrer confesses all alledged by the bill, and goes to the whole relief, which is not proper to be determined on a demurrer.

This matter arising upon a new law, the Court took time to consider it, and in *Michaelmas* Term, on *Saturday* — *November*, now Baron *Thompson* being dead, the other three Barons agreed in opinion, That the demurrer by the defendant *Meredith* ought to be over-ruled; and at the desire of the others, I delivered the opinion of the Court to this effect.

That the demurrer is bad, as to such part of the bill as seeks to be let into possession of two thirds of the estate in the bill, to be permitted to have and enjoy, and be quieted in the possession thereof by the injunction of the Court, or seeks to redeem the mortgage mentioned, or any other relief. Now it is plain, and agreed by the Counsel for the defendants, that the demurrer being intire, if it be faulty in any part, it ought to be over-ruled.

It is so at law; if the defendant demur to the whole declaration, or the plaintiff to an avowry in a replication for rent, of which part appears not yet due, the plaintiff or avowant shall have judgment to recover for such part as is well dem-

mandated, 1 Salk. 218.
Holt, 191. S. C.

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manded, or appears to be due. 1 *Sand.* 286. Resolved 2 *Sand.* 379, 380.

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It is the same in equity, and the reason is obvious; for the demurrer is a stop to the plaintiff's demand of every thing to which it extends; but it would be unreasonable to refuse the aid to which he is in conscience entitled, because he asks something more.

Perhaps it is improper for the plaintiff to pray that the Court should let him into the possession of the estate, for that he must recover at law; but there are other things wherein it may be proper that the plaintiffs should ask the assistance of the Court. The bill suggests that the plaintiffs have brought an action of ejectment; but the defendants, by making a mortgage to *Roberts*, and making him a defendant, render it impossible for them to recover at law; and they pray that it may be set aside, or if made *bond fide*, that on payment of what is due they may be admitted to redeem.

In respect to which the Court may probably give relief; but the demurrer is against all relief.

But it is objected, that in case the plaintiffs, as the next Protestant kin, may have the rents and profits by virtue of the statute 11 & 12 *W. 3. c. 4.* yet they have only the bare perception of the profits, and no estate in them, for the legal estate remains in the Popish heir, who may sell, devise, or transmit it to his posterity, and consequently that the Protestant kin can have no title to redeem.

It is true, the words of the statute being, That every such person educated in the Popish religion, or professing it, shall in respect of himself only, and not in respect of his heirs or posterity be disabled to take, &c. the seisin of the estate has been construed to remain still in him; for otherwise it would be difficult to say how his heir could have the estate consistently with the known rules of law. So it was holden in *Tredway's Case* *Hob.* 73 (a). *Ley* 59. S. C. upon the statute 1 *Jac.* 1. c. 4. which is penned in the same manner; and

(a) Jenk. 297.
S. C.

and therefore a Papist tenant in tail may make a tenant to the *præcipe*, and suffer a common recovery; as was resolved in the case of *Thornby* (a) and *Fleetwood*, 10 *Anne*, and in Lord *Derwentwater's* (b) case, 6 *Geo.* 1. So he may devise the estate to a Protestant. Resolved in *C. B.* in *Easter Term* in 1738. in the case of *Matlem* (c) *vers.* *Bingloe*, and in the case of *Marribod* and *Dorrell*, *H.* 8 *Geo.* 2. in *B. R.*

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(a) *Supra*, p. 207.

1 *Str.* 267.

(b) 9 *Mod.* 172.

2 *Eq. Abr.* 621.

pl. 7. *S. C.*

(c) *Supra* p. 570.

2 *Eq. Abr.* 626.

pl. 26.

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But yet the next Protestant kin after his entry has an estate and interest, which enables him not only to receive the rents and profits, but likewise to lease the lands during his title, otherwise he could not maintain an ejectment; and if he has such an interest that he may lease, surely he may likewise redeem a former mortgage, as well as a lessee for years may do so. A copyholder is not seised of the estate, the seisin of the freehold remains in the Lord of the Manor; yet as a copyholder may make a lease whereon an ejectment is maintainable, 4 *Co.* 26. so he may redeem a mortgage made of the copyhold estate.

A tenant by statute-staple, statute-merchant or *elegit*, has but a chattel interest *quousque debit. levat. fuerit*, yet daily experience shews that he is admitted to redeem.

It is said indeed, that a Protestant kin is a mere pernor of the profits, and therefore cannot redeem; but why? No authority is cited for it. In *Chudleigh's* case, 1 *Co.* 123. it is said, that a pernor of the profits is in nature of a *Cestui que Use* at common law; but none I believe will deny, but that a *Cestui que Use* might exhibit a bill in Equity to have the trust executed, and to redeem a mortgage made by the trustees with his assent. *Bro. Tit. Conscience.*

It was urged further, that none can redeem but he who is heir, assignee, or incumbrancer; and this is the general description of those who are entitled to an equity of redemption.

But

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One who claims
under a voluntary
conveyance
may redeem a
mortgage.
1 Vern. 193.

But it is certain that there is no necessity that a man should come in for a valuable consideration, in order to entitle him to redemption; for a person who claims by a voluntary settlement may redeem. 1 *Eq. Abr.* 315. And so it was resolved 1 *Ca. Ch.* 59.

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If a man makes a voluntary conveyance, and afterwards mortgages, though such mortgagee may avoid the conveyance as fraudulent to him, yet it suffices to pass the equity of redemption.

Indeed generally, he who redeems must be the mortgagor, or somebody who claims under him; but it is not requisite that he should claim by express assignment from him. A tenant in dower or by the curtesy may redeem, whose estate is created by the law; and he, who has an estate or interest given by Act of Parliament, has as much reason to have this benefit as he who comes in by the act of the party. Every one is party to an Act of Parliament; and there seems to be no reason why the person entitled by virtue of an Act of Parliament, should not have equal advantage in a Court of Equity with the assignee of the party. The assignee of commissioners of bankrupts may redeem as well as the bankrupt himself. *Dub.* 1 *Ca. (a) Ch.* 71.

(a) 2 Freem.
283.
1 *Eq. Abr.* 53.
pl. 1.

The only ground for redemption seems to be, the having an interest in or lien upon the land: he who has such an interest or lien may redeem, he who has none cannot.

And therefore if a man makes a bond, wherein he binds himself and his heirs, and afterwards mortgages his land, the obligee by judgment cannot redeem. But if he obtain judgment against the heir of the obligor, although the heir had before assigned his equity of redemption, the obligee, who gains thereby a lien upon the estate of the obligor against his consent, (for *judicium redditur in invitum*,) and solely by the operation and act of law, is entitled to redeem. *Bateman* and *Bateman*, 1 *Eq. Abr.* 315.

Nay,

Nay, if he gains but an equitable lien upon the lands, it is sufficient; and therefore if a man articles on his marriage to make a marriage settlement, and afterwards mortgages his estate to one who had no notice of the articles, the wife shall redeem; for the articles for a purchase are considered in equity as a purchase. 2 Vent. 343. (a)

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(a) 1 Eq. Abr.
63. pl. 3. 221.
pl. 5.

So if a man agrees at his marriage to leave his wife worth 1000*l.* and it being left to the parson of the parish to draw the agreement, who takes a bond for the payment of the money, and then the obligor dies, leaving his estate freehold and copyhold in mortgage; the wife, having an equity upon the land by virtue of the agreement on the marriage, was allowed to redeem. *Adon and Pierce*, 2 Vern. 480.

Supra p. 67.

But against the plaintiffs having the liberty of redemption it was further argued, that a Court of Equity ought not to aid or assist the execution of a penal law; and it is certain, that it is not in the power of a Court of Equity to extend a penal law beyond what the law itself imports, or the Courts of law will extend it; nor is it proper for a Court of Equity to assist the recovery of a penalty or forfeiture, when the party may proceed at law to recover it; therefore there is no reason to apprehend, that the Court will in this case put the plaintiffs into possession, if the law will not do it, or give them any advantage beyond what the law intended them. But if the defendants by contrivance set up a mortgage, which renders their proceeding at law impracticable, it may be fit for a Court of Equity so far to interpose, as to prevent these unfair measures which are designed to elude the benefit of the law.

If a lessee commit waste, the Court will not oblige him to discover the wrong he has done, which may subject him to a penalty, or construe that to be waste which the law will not call so; but will stay his going on in the destruction he is making, till it be seen whether he has any right to do

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(a) 2 Vern. 449.
Prec. Ch. 214.
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do so or not. It is said, 1 *Eq. Abr.* (a) 131. that if a trustee, by fraud and combination with *Cestui que Trust*, endeavours to evade a penal law, under a pretence that Equity should not assist a penalty or forfeiture, Chancery will aid, and not suffer its own maxims to be made use of to elude a beneficial law.

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Supra p. 572.

It was said, that if the mortgage was without any real consideration, it would be a trust for the papist, and consequently void at law; but I doubt that is not so; for by what has been said it appears, that a papist has such an estate in him that he may alien and demise, and consequently the estate granted to *Roberts* would pass an interest to him, though made without a valuable consideration, which would be a title prior to the demise by the lessor of the plaintiff in ejectment.

As to the inconveniencies which may ensue from the plaintiff's being allowed to redeem, I see no greater than what may be supposed in a redemption by a dowress, or other person who has but a particular estate or interest. It may be said, that he is mortgagor and mortgagee, if he take the assignment of the mortgage to himself; and as for his being punishable for waste, he is liable to answer treble damages for any voluntary waste, in an action of debt.

In short the plaintiffs may have many occasions for the aid of a Court of Equity; and therefore since the demurrer is general to all relief, since such a practice of setting up a mortgage to prevent the Protestant kin from recovering, if he can have no relief, would intirely defeat the design of the act, we are of opinion that the demurrer ought to be overruled.

As to the plea, we all agree that it ought to be allowed; for the discovery, to which this plea is pleaded, tends directly to make the defendants accuse themselves of those offences which might subject them to the penalties and incapacities of the

the

the act. It is the excellent temper of the *Englisch* law, that nobody is compellable to accuse himself; *Nemo tenetur seipsum accusare.*

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This has been determined not only in Courts of Law and Equity, but in Parliament.

It is true, that by a constitution of Cardinal *Otho*, the Pope's Legate 21 *H. 3.* it was ordered, *Quod jurament. calumnie in causis ecclesiast. & civilib. de veritate dicenda in spiritualib. quo veritas facilius aperiatur, prestari debet de cetero in regno Angl. Conf. in contrarium non obstante.* But this was allowed only in causes matrimonial and testamentary. 2 *Inst.* 657. And by the statute 13 *Car. 2. c. 12. sec. 4.* No Ecclesiastical Judge can tender oath whereby any person may be charged to accuse himself, or subject himself to censure or punishment, &c.

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But the case of *Smith* vers. *Read* is a direct determination in point; or this is rather a stronger case, where the defendants are asked as to their own education in the Popish religion; there they were interrogated only as to the person under whom the defendants claimed.

Supra, p. 665.

What was said, that *Roberts* is asked whether they were not brought up in the Popish religion, is a mere evasion; for though *Roberts* the other defendant is asked these questions, yet all the defendants are charged with being so educated, and all are desired to answer the matters as fully as if the same were particularly repeated and interrogated.

It was said that the defendants might be asked of what age they were; but the charge is, that they were of the age of 18 years and six months, whereby they were incapacitated to hold the estate; so that the enquiry about their age, is only with a design to subject them to that incapacity; and the plea is worded with like caution.

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As to the demurrer and plea of *Watkins* and his wife, the same stand upon somewhat a different foot; it is not charged by the bill, that *Watkins* the husband was a Papist, and consequently it must be intended that he is a Protestant; for every one must be presumed to be of the established religion till the contrary appears; then the question will be, Whether, if a Papist marry an husband who is a Protestant, the next of kin, who is a Protestant, to her before her marriage shall take the rents and profits of her estate from the husband during coverture?

The statute saith, That the person educated in the Popish religion shall be disabled to take and hold any lands, &c. but the husband is not so educated, and consequently not disabled to take and hold them, as by law he is entitled to do.

It was rightly observed, that the pleading is, That the husband and wife are seised in right of the wife; whence it was inferred, that both being seised, the Protestant kin will be entitled to have and enjoy the lands, of which the wife is still seised after her marriage.

But that inference is not to be drawn from the form of pleading; for it is true, that the wife has a joint seisin with the husband of the freehold and inheritance, which the husband therefore cannot dispose of without her; but the husband alone has the title to the rents and profits, and may dispose of the possession during the coverture without the wife. A writ of entry *sur disseisin* was brought against husband and wife, who pleaded *non-tenure*; the demandant replied, that *A.* was seised till disseised by husband and wife, who made a feoffment to persons unknown, but the husband and wife continued to receive the profits; but the replication was disallowed, for the pernanity of the profits being but a chattel could be only in the husband. *Bro. Tit. Partner de Profits. 15.*

If a feme leases *dum sola* and marries, and the lessee pays his rent to the wife, though no notice of the marriage is alleged, the payment is ill; and the husband had judgment in debt for the rent. (a) *Pal.* 206. *Tracy and Dutton.*

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(a Cro. Jac.
617. S. C.

So the husband may sue alone for rent, for not repairing, &c. or other profits or benefits to the estate of the wife; and though he may, he need not join his wife. *Cro. Car.* 438.

1 Str. 229.
Com Dig Tit.
Baron and Feme.
(X.)

Now here the pernors of the profits demand the rents and profits from the husband who is legal pernor of them, and the design of the act seems as well answered by the husband's taking them as any other.

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But the Court need not give any positive opinion on this point, because the demurrer being general as to all relief, and it being possible that the Court may find it needful to give some sort of relief with respect to these defendants also; and therefore the Court thinks fit that this demurrer as well as the other by *Meredith* be over-ruled; but the plea ought to be allowed.

Mackenzie *versus* Marquis of Powis. In Case 272. Scacc.

A DECREE was made against the Marquis of *Powis* for the payment of a large sum of money; and he being served with a copy of the decree, and not paying, an (2) attachment

A decree served on a peer needs no letter misfiv. (1)

(1) *Blackstone*, in the third volume of his Commentaries, says, "If a peer is a defendant, the Lord Chancellor sends a *Letter Misfivue* to him to request his appearance, together with a copy of the bill; and, if he neglects to appear, then he may be served with a *subpoena*; and, if he continues still in contempt, a sequestration issues out immediately

against his lands and goods, without any of the mesne process of attachments, &c. which are directed only against the person, and therefore cannot affect a Lord of Parliament."—p. 445.

(2) *Quere*, Is not this process of attachment irregular, not upon the ground of the omission of a *Letter Misfivue*,

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tachment went ; and it was now moved to discharge the attachment as irregular ; because no Letter Missive was sent before or with the decree which was served ; for where the defendant is a peer of the realm, a letter is sent to him signed by two Barons, instead of a *Subpœna* ; and so it ought to have been in the present case, instead of the *Subpœna* which is served upon him, together with the copy of the decree.

This was referred to the Deputy Remembrancer to report how the practice was ; who reported that it was not usual to send such letter before or with the order of Court or service of the decree ; whereupon the motion was not allowed.

[676] And there seems no reason for what was insisted on ; it is well known that the *Subpœna* was introduced in the time of Richard the Second, when *John Waltham*, Bishop of *Sarum*, was Chancellor of *England*. *Selden's Works*, vol. 6. p. 1544. When the practice was introduced of sending a letter to a Peer instead of such a *Subpœna*, *non constat*. Mr. *Selden* says, in his 6th vol. p. 1543, That it was the course in the Star Chamber of Chancery to pray such a letter in a bill against a Peer ; possibly that practice being begun in the Star Chamber on the erection of that Court towards the end of *Henry* the Eighth's reign, might be afterwards followed in Courts of Equity. No mention of any process but a *Subpœna* is made in the Year Books or the *Doctor and Student*, but in *West Symb.* f. 21. it is taken notice of as the course in Chancery.

This may be a proper compliment before the party is in Court ; but when he has appeared and answered, and a decree is against him, it seems more proper to demand obedience to it by process of the Crown, than by a letter from the Barons ; by the order 35 the direction is general, that the defendant

Missive, which under the circumstances of the present case might be justified, but on the ground of the object of it being a Peer of Parliament ? For this

purpose consult 2 Vent. 342. *Selden's Works*, vol. 6. page 1543. Com. Dig. Tit. Chancery. (D. 2.)

shall

shall be served with a copy of the decree in person, and a *Subpœna* shall be annexed to it, and served at the same time. In Chancery the *Subpœna* is inserted in the writ itself, which contains and recites the decree, and no such letter is sent; but if the defendant disobeys, an attachment and injunction shall go. 2 Vern. 91, 92.

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What use can there be of such a letter? Is it to notify the decree to him to which he is no stranger? For he is supposed present in Court by the *Subpœna ad audiend. Judicium*, and a more full notice of it is given by the copy of it served.

Term. Sanct. Mich.

13 Geo. II.

Cafe 273. Scot *qui tam* and Bray *versf.* Schawrtz & al'.
In Scacc'. Mich. 11 Geo. 2.

In an information upon the statute 12 Car. 2. c. 18. it was determined that a ship which was manned by mariners resident for some years in *Russia*, but who were not natives of the country, was exempt from the penalties of the act.

AN information was exhibited in the Exchequer by Scot *qui tam*, &c. setting forth, That he had seized the ship called the *Constant* in the port of *London*, with its tackle, goods, &c. as forfeited to the use of his Majesty and himself, being imported from foreign parts, when the ship, in which they were imported, was not belonging to the people of *Great Britain* as the true owners, and whereof the master and three fourths of the mariners are *English*; nor of the built of the country of which the goods were the growth, product or manufacture, or of the port where such goods only can or are most usually first shipped for transportation, and whose master and three fourths of the mariners at least were of that country or place; whereby the ship and goods were forfeited.

Upon which a writ of appraisement went out, and on the 22d of *October* 1737. was returned.

On this seizure *Adam Henry Schawrtz*, *Samuel Felman*, and *Thomas Zuckerbecker*, merchants of *Riga*, entered their claim; and, after Oyer of the information, pleaded, that the ship and goods were not imported contrary to the form of the statute.

This

This issue came on to be tried on the 29th of November 1738. and the jury found a special verdict.

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That *Scot* who fues *qui tam*, &c. was surveyor of the act of navigation, and seized this ship and goods on the 19th of August 1737. as not navigated according to the act.

That the said ship set sail from *Riga* in *Russia* for the port of *London*, with the goods in the information, which were the product of that country; that the ship was built in *Russia*; that *Harry Hagson* was master, who was born out of the dominions of the Empress of *Russia*, but in the year 1733 was admitted a burgher of *Riga*, and has ever since continued so, and has been resident there when not engaged in foreign voyages, and traded from thence nine years before the seizure. That there were only eleven mariners on board, of whom four were born in *Russia*; that *Morgan* a fifth was born in *Ireland*, and there bound apprentice to the master, and as such went with him to *Riga*, and three or four years before the seizure served on board the said ship, and sailed therein from *Riga* in the present and former voyages; that the other six mariners were born out of the dominions of *Russia*, but *Stephen Hanson*, one of them, had resided at *Riga* eight years next before the seizure, *Hans Yaspas* five years, *Reign Steingrave* four years, and *Derrick Andrews* the cook seven years, and these four during those years had sailed from *Riga* in that and other vessels; that *Riga* is a port where the goods seized can only be, or most usually are, first shipped for transportation.

And if on the whole matter found, the Court think that the importation of the goods in the ship being so navigated is legal, they find for the claimants; *Et si non, &c. contra.*

Upon this special verdict Mr. Solicitor General insisted, that the ship and goods were forfeited by the statute 12 Car. 2. c. 18. sec. 4. intituled, An act for the encouraging and increasing of shipping and navigation.

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This act was meant for the encouragement of the *English* shipping and navigation, for that is intended in the title, as appears by the preamble, which says, For the encouragement of the navigation of this nation; and the principal means to encourage it was by prohibiting the importation or exportation of any goods into or out of his Majesty's dominions, but in ships which are built or belong to his dominions, and whereof the master and three fourths of the mariners at least are *English*.

The only clause in this act under which the claimants can shelter themselves, is *sec.* 8. which saith, that no goods of the growth, production or manufacture of *Muscovy*, or of any countries, &c. to the Great Duke or Emperor of *Muscovy* or *Russia* belonging; as also that no masts, timber, boards, no foreign salt, pitch, tar, rosin, hemp, flax, raisins, figs, prunes, olives, oils; no corn, grain, sugar, pot-ashes, wines, vinegar, or spirits called *aquavite* or brandy, shall be imported into *England*, &c. in ships but such as belong to the people thereof, and whereof the master and three fourths of the mariners at least are *English*; and that no currans or other commodities of the growth, production or manufacture of any of the countries, &c. to the *Ottoman* or *Turkish* empire belonging, shall be imported in any ship but which is of *English* built and navigation as aforesaid, and in no other, except only such foreign ships as are of the built of that country or place of which the said goods are the growth, product or manufacture, or of such port where the said goods can only be, or most usually are, first shipped for transportation, and whereof the master and three fourths of the mariners at least are of the said country or place.

We do not insist but that the ship is *Russia* built, that the goods are the growth of that country; but what we rely on is, that the ship was not manned as the act requires; and this depends on two questions,

First, Whether the exception at the end of the clause extends to the whole clause, or only to the latter branch;
for

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for if it extends not to the whole, then it is plain that the ship was not manned as the clause requires, for it is requisite that the ship, though *Russia* built, should be manned with a master and three fourths of the mariners *English*, which it is evident this was not.

Secondly, Admitting that the exception extends to the whole; the next question will be, whether by what is found there appears, that the master and three fourths of the mariners are of that country.

First, Mr. Solicitor General urged (and in the next term Mr. *Hollings*, who then argued more largely) that the exception related only to the last branch of this section, which contains two distinct clauses; the first relates to goods from *Muscovy*; the second to those from the *Turkish* dominions; the first allowed to be imported in the ships of the country whence the goods were brought, whereof the master and three fourths of the mariners are *English*, the other are allowed only to be imported when the ship as well as the master and three fourths of the mariners are *English*, except when both are of the country whence the goods come.

Secondly, The first clause allows goods from *Muscovy* in ships of *Russia*, and only requires the master and mariners to be *English*; the next clause requires the ship as well as master and mariners to be *English*; it is most natural therefore that the exception which speaks of both should relate to the same clause which mentions both; there was no occasion to say with respect to goods from *Russia*, except the ship be of that country, for that was before provided for.

Thirdly, If such construction should be made, the *Russia* people would have larger privilege than the *English* themselves; for they might import goods in ships manned either with their own or *English* mariners; but the *English* can import only in ships whereof the master and three fourths of the mariners are *English*,

But

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But supposing the exception extends to both parts of this section, yet what is found by this verdict shews that the ship *Constant* was not manned according to the intent of the act of navigation; for it is found that the master and seven of the eleven mariners were born out of the dominions of the Empress of *Russia*; for what can be meant by *them of that country* but those who are born there?

The words are set in opposition to the word *English*, for the importation of goods was prohibited but in ships *English*, whereof the master and three fourths of the mariners are *English*, except it be in ships of the built of that country of which the goods are the growth, product or manufacture, whereof the master and three fourths of the mariners are of that country or place; now the word *English* must be meant of the natives of *England*, or at least such as are naturalized, none else can be called *Englishmen*. A Denizen indeed is an *Englishman*, *a parte jure*; but all others are Aliens, and if an Alien continues in *England* at all times after his birth, he does not thereby become a Denizen. 1 *Roll. Abr.* 195. All not born under the King's allegiance, naturalized or made Denizen are Aliens, and therefore cannot come under the description of *Englishmen*. I delivered the opinion of the Court, and said, that upon this information it may be fit to consider the drift and design of the act of navigation, which was intended, as Mr. Solicitor General observed, to encourage and increase the shipping and navigation of the *English* nation.

The means proposed as effectual for this end, were, That the importation of all goods from any of his Majesty's dominions in *Asia*, *Africa* or *America* into *England*, *Ireland*, *Wales* or *Berwick*, and the exportation from any of those places into any of his dominions in *Asia*, *Africa* or *America*, should be in ships of the built of and belonging to some of those dominions, whereof the master and three fourths of the mariners at least were *English*. *Sec. 1.*

And

And so likewise the carriage or removal of them from one port or creek in *England, Ireland, Wales, Guernsey, Jersey* or *Berwick*, to another. *Sec. 6.*

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2. That no goods whatsoever should be imported into these places of the King's dominions in *Europe*, from *Asia, Africa* or *America*, (though not under the King's dominions) but in such vessels and so manned. *Sec. 3.*

Thirdly, That no goods should be imported in such vessels so manned, unless shipped from the place of which the goods were the growth, production or manufacture, or in the port where they only can be or most usually are shipped for transportation. *Sec. 4.*

By these methods all foreigners were excluded not only from the import or export of any goods of the growth or manufacture of *Asia, Africa* or *America*, into or out of *England* or *Ireland* or the adjacent isles, and from carrying them from one port to another in these kingdoms or isles, but were likewise restrained from bringing them into any *European* country for the use of the *English*, since the *English* could not fetch them thence; which must necessarily contribute greatly to the increase of the *English* shipping and seamen.

But as it was the policy of the legislators to prohibit the importation of all goods from *Asia, Africa* and *America*, (for so in effect it is) unless brought in vessels of the King's dominions, whereof the master and three fourths of the mariners are *English*; was it their intention to prohibit all *European* goods likewise, unless so imported? No surely, that could not be convenient; and therefore a medium is found out for *European* commodities; none shall be imported from the dominions of the Emperor of *Muscovy* or *Russia*, no masts, timber, boards, salt, pitch, tar, rosin, hemp, flax or pot-ashes, which are great part of the traffick from *Denmark, Sweden, the Baltick* and *Northern* seas; no raisins, figs, prunes, oil, olives, corn, grain, sugar, wines, vinegar and spirits, which comprehend the chief

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trade in the *Levant* and other countries of *Europe*, shall be imported, unless in ships belonging to the people of that country whence the goods are brought, and of which the master and three fourths of the mariners are *English*; no currans or other goods from the *Turkish* dominions shall be imported, unless in ships *English* built, navigated as aforesaid.

But suppose they will not send these goods in such manner, shall they not be imported? Yes, they may, in ships of the built of that country whence the goods are, in which the master and three fourths of the mariners are of that country or place, but then they shall pay Aliens' duties. Sec. 8, 9.

This seems the plain intention of the law, to encourage the importers of these goods to make use of *English* shipping and seamen; but in case they have ships and men of their own country, the importation is not prohibited, but they may use them paying Aliens' duties.

So ling, stockfish, pilchards, or other dried or salted fish, not caught in *English* vessels, codfish, herring, oil and blubber from fish, whalefins and whalebones cured, saved or dried not by the people of *England*, may be imported, paying double Aliens' duties.

Now to bring what has been mentioned to the information.

Two things have been insisted on to support it.

First, That the exception in the end of the eighth section doth not extend to the goods of that country.

Secondly, Admitting that it should, yet nothing is found by this special verdict, which shews that the master and three fourths of the mariners are of that country or place whence the goods are brought, as the act requires.

As to the first, it must be admitted, that if the exception, sec. 8. does not extend to the whole, but is to be confined

to the latter part of that clause, the navigation is not legal; for though the ship *Constant* be *Russia* built, and laden with goods of the growth or manufacture of *Russia*, yet it appears that the master and three fourths of the mariners are not *Englisb*.

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But on consideration of what has been urged, which is as much I think as could be urged on that point, I think the exception extends to the whole section.

It is a general rule in construction, that where restrictive words are found at the end of the last sentence, which are properly applicable to the several sentences preceding, they shall extend to the whole. 1 *Sand.* 60, *Gainsford* and *Griffith*.

Now this 8th section contains the provision which the Legislature thought fit to make in relation to the importation of *European* goods. It might be easily foreseen, that if we restrained the import or export of goods, unless in our own ships and with our own seamen, other States might do the like, and that in its consequences it would amount to a prohibition of all such goods; which would prove inconvenient; therefore they allowed the importation, but upon these terms, that the goods from Christian countries might be imported in their own ships, having the master and three fourths of the mariners *Englisb*; those from *Turkey* by our *Englisb* ships and mariners. It was not likely that the *Musselmén* who have an hatred to the Christian name, should like that their ships should be manned by Christians; nor was it safe or honourable in respect of ourselves or our religion, to permit our men to man their vessels; and therefore it was proper to prohibit the importation from thence but in *Englisb* vessels as well as with *Englisb* mariners.

But it was probable, that the Christian as well as the Mahometan countries might be unwilling to suffer such importation to us, unless made with their own men as well as their own vessels; and therefore the exception was
 • added,

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added, that it might be done by all such foreign ships as are of the built of that country or place of which the goods are the growth, production or manufacture, or where first shipped for transportation, and whereof the master and three fourths of the mariners are of the said country or place.

The exception is indefinite, *such foreign ships*, which has the force of an Universal, and must relate to ships from Christian as well as Infidel countries, and was equally necessary for them, unless it can be supposed that the Legislature meant to favour the *Turkish* more than the other states of *Europe*.

It was said indeed, that there was no need to repeat the words *ships or vessels* in this exceptive part of the clause, and therefore since *Turkish* goods were not to be imported but in *English* ships and with *English* mariners, by the latter branch of the section, the exception which speaks both of ships and mariners, ought to be confined to the latter branch.

But this does not follow; it is true that the other states of *Europe* are allowed before to import in their own ships with an *English* master and mariners; the *Turkish* not, unless the ships too be *English*; the exception therefore must necessarily mention ships as well as mariners of the country whence the goods came; and though it was needless with respect to other *European* states, yet it could not be avoided if the same liberty was intended for both *Turkish* and Christian countries, unless there had been a larger tautology by repeating twice the same exception, once without the words *ships and vessels*, and afterwards with them.

But it was insisted, That by this construction the importers of goods from *Muscovy* would have more privilege than the *English* themselves; for these could import only in *English* vessels and *English* seamen, whereas they could use either such, or vessels of the country whence the goods come; this indeed is specious, but if you consider the drift
and

and design of the law, which was the increase of *English* seamen, and it is a sure means to augment the numbers and skill of our mariners to have them man foreign as well as their own country vessels, in case care be taken to call them home when our own occasions require them.

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But this construction is made very plain by the next section, *sec. 9.* where the goods of *Muscovy* and all mentioned in the sect. 8. as well as the *Turkish* commodities imported in other than such shipping, and so navigated as aforesaid, are declared to be Aliens' goods, and liable to the same customs and duties.

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Secondly, The next question then will be, Whether by what is found it appears that this ship in the information was manned as the act of navigation requires.

And this depends upon the meaning of these words, *whereof the master and three fourths of the mariners are of the said country or place.*

What is meant by the words, *Whereof the master and three fourths of the mariners are English*, seems to be explained by the act itself; in *sec. 2.* it is said, *No Alien born, unless naturalized or made Denizen, shall use the trade or employment of a merchant or factor in any part of his Majesty's dominions in Asia, Africa or America.*

So in sect. 6. it is said, *No persons shall load on any bottom, &c. of which any stranger or strangers born (unless such as be Denizens or naturalized) are owners, part-owners or master, any goods to carry from one port to another; which imports, that none can be looked upon as English but such as are natives, naturalized or Denizens.*

And it is certain, that by the laws of *England* all others are esteemed Aliens, and are not intitled to all the same privileges and advantages which other *Englishmen* have.

And though an Alien continuing in *England* shall not become so much as Denizen, though the continuance be ever
so

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so long, as was holden in the case cited, 1 *Roll. Abr.* 195. whence it was inferred that the words (*those of other countries*) being set in opposition as it were to (*English*) ought to be natives of that country, or at least what is tantamount; yet it does not appear that any antithesis, or direct opposition was designed by the expressions used in the act; our laws in relation to Aliens were perhaps, as Mr. *Spellman* thinks, originally a branch of the Feudal law, where none could hold lands without being obliged to swear fealty to his lord; which a foreigner under the allegiance of another prince could not be supposed able to perform.

In the case of *Collingwood* and *Pace*, 1 *Vent.* 417. *Hale* Ch. Justice says, the law is the measure of the disability of Aliens, and the only rule to determine how far it extends; so that we cannot reasonably argue from the authorities in our law concerning Aliens, as to the ability of persons in other countries, and what shall denominate them to be persons of that country or not.

The methods of denization and naturalization used with us are not known in other countries. Ch. Just. *Hale* quotes *Terrien*, to shew that they in *France* naturalize according to the laws of *Normandy*. 1 *Vent.* 419. But that is in a different manner from us, where it can be done only by Parliament.

In *Domat's Suppl. to the Civil Law*, Vol. 2. l. 1. tit. 2. sec. 2. art. 9. it is said, that if foreigners desire to fix their habitation in *France*, and enjoy the rights and liberties peculiar to the subjects thereof, the favour is granted by letters of naturalization obtained from the King, which are called so, because those who obtain them are reputed by the effect of the said letters to be as natural-born subjects of *France*.

But on the trial of this information, it was proved by a witness, who seemed acquainted with the dominions of *Muscovy*, that no such thing as naturalization was known or practised there.

The

The best method we can take to find out whom the Legislators intended should man foreign ships which imported goods hither, may be to resort to the act itself, and see what can be collected from thence.

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Now the sect. 8. which speaks of the importation of goods from *Muscovy*, and other *European* countries, says, they must be in ships that truly and *bona fide* belong to the people thereof; and by the conclusion it says, the master and three fourths of the mariners must be of that country, that is, they must be people of that country.

Who shall be said to be people of that country the act does not directly determine, but seems to use the words in as large a sense as if it had said the inhabitants of that country, without any precise designation of natives or not.

So sect. 4. which speaks of ling, pilchards and other dried and salted fish, usually fished for and caught by the people of *England*, *Ireland* and *Wales*, must denote the inhabitants of those kingdoms generally, whether natives or not.

So when it says, codfish, herrings, oil and blubber made of fish, when imported into *England*, *Ireland* and *Wales*, not being caught by vessels belonging thereunto, and the fish cured, saved and dried or made by the people thereof, shall pay double Aliens' customs, it must mean the inhabitants thereof generally, for it cannot be supposed that the Legislature meant that if the fish were cured and dried by inhabitants not natives, or the oil or blubber made by such, that the importer should be excused from the double duties.

So where sect. 16. speaks, that the act shall not extend to fish caught, saved and cured by the people of *Scotland*, imported from *Scotland* in *Scotch* vessels, the master and three fourths of the mariners being his Majesty's subjects; must it be inquired whether the fish were caught by natives

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of *Scotland*, before it be known whether the ship and goods were forfeited or not?

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The intent and design of the act therefore seems to be, that no foreign ships should import any of the goods specified in this section, if they sent for mariners from any foreign kingdom or state to man them; but they might be allowed to import them if the master or three fourths of the mariners were *English*, or those who dwelt in their own country.

It does not indeed precisely fix and determine who shall be said to be the people of a country, but gives it a larger extent and signification than what is meant by the natives of a country, but the precise notation of it is left to the general import and common understanding of the word.

Now by the civil law, which is used in most parts of *Christendom*, and may not improperly be considered on this occasion, it is said, *Just. Inst. lib. 1. tit. 2. Appellatione populi, universi cives significantur*; the word *civis*, taken in the strictest sense, extends only to him who is intitled to the privileges of the city of which he is a member. And in that sense there is a distinction between a citizen, and an inhabitant within the same city, for every inhabitant there is not a citizen; *Cives quidem origo, manumissio, adjectio, vel adoptio, incolas vero domicilium facit*, saith *Cod. l. 10. tit. 39. l. 7.* So *Dig. (a) l. 9. tit. De verbor' significatione, 239. Incola loci est, qui in aliquâ regione domicilium suum constituit.*

(a) Dig. Lib.
50. Tit. 16.
L. 239.

It is fit therefore to consider how the matter stands as to the master and mariners in the ship mentioned in the information.

First as to *Harry Hagson* the master (for if he be not qualified the navigation is illegal) it is found as to him, that he in 1733. became a burgher of *Riga*, and has ever since continued so; that for nine years he has been resident there, unless when he went in foreign voyages.

Now I am of opinion, that he is sufficiently qualified to man the ship.

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It is true, he is found to be born out of the Empress of *Russia's* dominions, but he has been resident there nine years, and in 1733. was made a burgher of *Riga*.

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Now if his birth under the dominion of *Russia* be not necessary, there can scarcely any thing be thought more cogent to denominate a man of that country; for being a burgher there he must of course take the oath of allegiance to the Empress, as it appeared on the trial that he had done, although the evidence of it was not admitted to be read, it being only a certificate of it without proper attestation.

He must therefore be a subject of the Empress, which is all that is contended for on the last argument as needful to denominate him of that country.

By the statute (a) — H. 8. — a person sworn to a foreign prince is looked upon as a stranger to his native country, and shall pay Aliens' duties.

(a) Stat. 14 &
15 Hen. 8. c. 4.
sec. 2.

The greater difficulty will be in regard to four other of the mariners, one of whom is said to have resided at *Riga* eight years, another seven, another six, another only four years before the seizure, and during these years to have sailed from *Riga* in this and other voyages.

Now I am of opinion that these are men of that country within the intent of the act of navigation. First, Because the act seems to intend by people of a country any who are settled and fixed inhabitants there; and when it mentions mariners of the said country or place, it still speaks more loosely and generally, and consequently a residence of four, six or eight years may well satisfy that expression.

Secondly, This seems to answer the design of the act, which was not so much to create difficulties in other countries to find mariners among themselves, as to prevent their

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supplying themselves with any mariners from other states but *Engliß*.

Thirdly, Because by the Civil Law such a residence gives the country a right to their service, *Qui originem ab urbe Romæ habent, si alio loco domicilium constituerunt, munera ejus sustinere debent.* Dig. l. 50. tit. 4. lex. 3.

So Cod. l. 10. tit. 39. l. 5, 6. *Si in patriâ uxoris tuæ, vel quâlibet aliâ domicilium defixisti, incolatus jure ultro te ejusdem civitatis muneribus obligâsti. Privilegio speciali civitatis non interveniente tamen originis ratione, ac domicilii voluntate ad munera civilia quæque vocari certissimum est.*

Fourthly, The special verdict does not find that these persons had ever any residence or habitation (since they were grown up) in any place out of the dominions of *Russia*; it is found indeed that they were born out of the dominions of *Russia*, but that they dwelt or resided any where else so long as they have done in *Russia* does not appear, and what does not appear is not to be intended.

It is found that they made several voyages from *Russia*, but it does not appear that they ever made any voyage from any other country whatsoever; so that they may be properly said to be mariners of *Russia*, but there is no foundation to say that they were ever mariners of any other country or place.

And it is not inconsiderable (which was an observation of Baron *Wright's*) that the Act of Navigation requires only, that foreign vessels be manned by a master and three fourths of the mariners who are of the same country; it does not say by mariners born in that country, or brought up there, but mariners of that country, which is a denomination they must acquire long after their birth, for they could not be born mariners, and if they are of that country while they are mariners, and never were mariners of any other country, it seems fully to satisfy the words and intent of the act.

It is an usual distinction in most countries and states to distinguish between the inhabitants of the land and strangers; in Greece they distinguish between their Πολιται, Μετοικαι, and Ξενοι, their citizens, their sojourners, (as the Archbishop Potter calls them in his *Antiquities of Greece*, book 1. cap. 9.) and strangers; the Μετοικαι were born in some foreign country, and came to settle in Greece, and were liable to pay tribute and perform some duties, but were not capable of bearing offices, or of intermeddling with the affairs of government.

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So the Civil Law distinguished between *Originarii* and *Incole*, and those who had not a fixed abode, but were strangers there, *Cum neque originales neque incolas vos esse memoratis, ob solam domus, vel possessionis, causam, publici juris auctoritas muneribus subjugari vos non finet.* Cod. 10. tit. 39. l. 4.

So in our law the like distinction is made between settled inhabitants of any parish and places, and those who are not so. *Supra*, p. 535.
2 Inst. 702.

But it was insisted, that they ought to be subjects at least to the Empress of Russia; how does it appear that they were not so? It is not found they were not, or that they were subjects to any other Prince; upon the trial it appeared that they were Swedes by birth, but whether born in that part of Sweden which came under the dominion of the Czar or elsewhere, is not found; if conquered by the late Czar, they are since become his subjects. *Gro. de jure B. & P. lib. 3. cap. 8.*

But if the laws of Russia are not contrary in this respect to ours, by their being resident there they owe a local allegiance. In *Courteen's* (a) case, which was an information against several Dutchmen for transporting money, it was said, by *Hobart*, that they were subjects, and owed allegiance to the King; and if they committed high treason, the indictment must say *Cont. Domin. suum*, though not *Naturalem Domin.* & contra *debit. ligeantia.* *Hob. 271.* So in 7 Co. 6. b. *Calvin's* case; and this was agreed, and that in all indictments for

(a) Poph. 149.
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high treason the omission of *cont. ligeantie sue debit.* was error, which was afterwards affirmed in the House of Lords. *King and Queen versus Tucker, (a) 4 Mod. 162. Show. P. C. 186.*

(a) 1 Ld. Raym.
1. Skin. 338.

360. 425. 442. 12 Mod. 51. Holt, 678. 2 Salk. 630. 3 Lev. 396. Carth. 317. Comb. 257. S. C.

But it was urged, that by this construction the act might be eluded; foreigners might stay a day or two, and then man their vessels; for if residence for two or three years will suffice, why not for two or three weeks or two or three days; where will you stop?

But no such consequence can be drawn from what is said, for if that was specially found, it might alter the case; that would be an artifice or fraud to evade the act; but nothing of this nature is found, which in a penal act must be, or it cannot be intended.

By the Civil Law a bare habitation does not entitle any to have the *jus incolatus*; it must be where a man *Domicilium constituit, ubi larem summamque rerum habet, unde si discedit peregrinari incipit, & cum redit peregrinari definit*; and such not liable to charges or offices *ut incolas ad munera subeunda vel honores capessandos non astringuntur.* Cod. l. 10. tit. 39. l. 3.

By the common law, habitation for a year and a day was requisite to make a person settled there; but upon the whole it would be almost impracticable, and make commerce very hazardous, if every merchant was to search out the nativity of every mariner whom he employed, and in case of mistake or misinformation was to forfeit his ship and cargo. And as no such construction appears hitherto to have been made of this act since the passing of it, the Court gave judgment for the defendant.

The Governors, Bailiffs, and Commonalty of the Company of the Conservators of the Level of the Fens, *vers.* Thomas Hare. In Scacc. Case 274.

THIS was a bill for an injunction to stay the proceedings in an action of ejectment for lands in *Norfolk*, brought on the demise of Sir *Thomas Hare*, after a verdict for the plaintiff.

A Court of Equity will dismiss a bill for the recovery of matters which are properly triable at law.

And it appeared by the bill and answer, that in the year 1665, the Adventurers of the Fens in *Com. Norfolk* made two great drains in the *Level* called ——— one whereof was called the 20 foot drain; and afterwards in the same year they were incorporated by the name above.

That by articles of agreement made on the 12th of *April* 1680, between Sir *Tho. Hare*, father of the now defendant, and *George Dasbwood*, Esq. on his marriage with *Elizabeth*, daughter of the said *George Dasbwood*, in consideration of 12,000*l.* to be paid for clearing the debts of Sir *Thomas* on his manors and estate in *Stowbardolph* and *Wimbotsbam* in *Com. Norfolk*, which Sir *Thomas* covenanted to employ accordingly, and to settle the said manors and estate for a jointure and provision for her, and in lieu of dower, to the use of him and the said *Elizabeth* during their lives, subject to a condition as to *Stowbardolph*, that if Sir *Thomas* should die leaving his wife, and an heir or heirs male of their bodies then living, she should have his estate in *Suffolk* and *Essex* for her life, instead of the manor of *Stowbardolph* and estate there, and in bar of her dower; and on conveying the estates, *George Dasbwood* covenanted that she should surrender and release her interest in *Stowbardolph* to and for the use of such male or males so living; but if Sir *Thomas* died leaving no issue male, *Elizabeth* should enjoy the estate in *Stowbardolph* and *Wimbotsbam* for her jointure, notwithstanding the said proviso; and the estates

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in *Suffolk* and *Essex* should be sold for daughter's portions, if any; and Sir *Thomas* covenanted, that from his marriage, his manors, &c. in *Stowbardsolph* and *Wimbotsbam* should be settled by law, according to the intent of the articles, and that he would stand seised of the estates in *Suffolk* and *Essex* to the use of *Elizabeth* for life.

That by indentures of lease and release, dated the 6th and 7th of *October*, 1682. in consideration of the said marriage had, and of 13000*l.* portion, (1000*l.* more being paid pursuant to the articles on the birth of the first child) and for settling the lands after-mentioned for the jointure of *Elizabeth*, and for the uses afterwards expressed, and in pursuance and for full performance of the articles before the marriage, the said Sir *Thomas Hare* conveyed the said manors of *Stowbardsolph* and *Wimbotsbam*, and several other manors in *Com. Norfolk* to *George Daffwood* and ——— *Brady* and their heirs, to the use (as to the manors of *Stowbardsolph* and *Wimbotsbam*) of himself for life, and then of *Ralph* his eldest son and the heirs male of his body, then to the use of his second, third, and all other sons of that marriage in tail male; then to the right heirs of Sir *Thomas*.

And as to the other lands in *Com. Norfolk*, to the use of Sir *Thomas* for life, then to *Elizabeth* for life for her jointure, then to Sir *Thomas* and his heirs.

By an indenture of lease and release dated the 21st and 22nd of *July* 1686, Sir *Thomas* conveyed 339 acres fenland, parcel of the said manor of *Stowbardsolph*, to *Chr. Crutford* and *John Milbourne* in fee, in trust for the level.

By an indenture dated the 22d of *July* 1686, reciting an agreement to sell 339 acres for the benefit of the level, paying 537*l.* 10*s.* and that such conveyance was made; but it appearing doubtful whether Sir *Thomas Hare* had at present any power to make such conveyance, Sir *Thomas Hare* agreed to give security for a good assurance of the 339 acres within thirteen years, from all claiming in remainder

&c.

£c. and thereby demised an estate of 40*l.* *per ann.* to them for 99 years, on condition to be void on making such an assurance. FENS. CORP. of
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That Sir *Thomas Hare* died — leaving issue *Ralph* and *Thomas*; that *Ralph* died without issue, whereby the estate descended to Sir *Thomas*, the lessor of the plaintiff. [696]

On this case it was insisted for the plaintiff in equity, that at the trial the settlement was produced, but not the articles; but it being therein mentioned, that the settlement was in pursuance of articles, the plaintiff had a verdict; but the articles being since discovered by the answer of Sir *Thomas Hare*, it appears that the settlement was made subsequent to the marriage, and quite variant from the articles, and consequently will not avail against a purchaser for a good and valuable consideration, as the Conservators of the Fens appear to be, but such a voluntary settlement is fraudulent; and although they could not take advantage of it at the trial, not having the articles to produce; yet now they (being produced) are proper in a Court of Equity to take advantage of, and the Court ought not to permit the plaintiff at law to proceed upon this verdict, which now appears to have been gained contrary to conscience.

That the articles only took care to secure a jointure for the wife for her life; and although the settlement should be good with respect to her jointure, yet in case any remainders be limited voluntarily after estates on good and valuable consideration preceding, such limitation of remainders without consideration will be void in regard to a purchaser, by force of the statute (a) 27 *Eliz.* — although the preceding estates stand good against him; and so it was resolved 2 *Lev.* (b) 147. *Lane* 22. 1 *Vern.* 285, 6.

(a) Stat. 27
Eliz. c. 4.

(b) 3 *Keb.* 526.
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That it is not material, that the purchasers had notice of this settlement in 1682, for where a voluntary settlement becomes void by force of the statute 27 (c) *Eliz.* it will be so, notwithstanding

(c) Stat. 27
Eliz. c. 4.

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(a) 3 Keb. 322.
1 Mod. 119.
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notwithstanding the purchaser had notice of such settlement; and so it was holden in 3 Co. 60. a. *Vide* 2 Lev. (b) 105.

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This case having been spoken to at large, the Court took time to consider of it till next term, and had copies of the articles and of the settlement laid before them for their consideration in the mean time; and this Court in *Hilary* Term decreed, that the plaintiff's bill should be dismissed without costs.

The reasons why the Court dismissed the bill were, that the bill was only for a discovery, and an injunction to stay the proceedings at law.

That the plaintiff had a discovery of the articles made before the marriage of Sir *Thomas Hare*, whereby they had in reality the fruit of their suit; that the bill made not out any case to entitle them to relief; what was prayed in relation to an injunction was general to stay all the defendant's proceedings at law; it cannot be desired that the Court should grant a perpetual injunction to stay for ever all the defendant's proceedings at law for the future, where the matter was properly triable at law.

Case 275. Rudge and James Hopkins, Plaintiffs, *vers.* Robert Chapman, Clerk, Robert, Bishop of Peterborough, John Hopkins, Christopher Hopkins, and 33 Inhabitants *de* Braybrook, *in Com.* Northampton.

Bill to establish
a *Modus* when
proper.

A BILL was exhibited by the plaintiff, setting forth that the plaintiff *Rudge*, and *John Hopkins*, deceased, were seized in fee of certain lands, lately purchased by them in the said county, without any benefit of survivorship; that they were sued by the defendant as Rector of the Parish of *Braybrook* for the tithes of the said purchased lands; who by his answer insisted, that *Robert Chapman*, the plaintiff in that cause, held

held and enjoyed a parcel of meadow land, called *The Dale*, in lieu of all tithe hay arising upon the said purchased lands.

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That after issue, and examination of witnesses, the cause was brought to an hearing on the 4th of *November* 1731, and on the hearing, the plaintiff's bill was dismissed with costs.

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That *John Hopkins*, by will dated the 10th of *November* 1729. devised his moiety of the purchased premises to the plaintiffs *J. Rudge, J. me: Hopkins*, and *Sir Richard Hopkins*, and their heirs, upon certain trusts therein mentioned; that the plaintiff *John Rudge* refusing to act, by a decree in Chancery released to the other trustees; and *Sir Richard Hopkins* is since dead; whereby the plaintiff *James Hopkins* is become the only surviving trustee of the will of *John Hopkins*.

So the bill prays that this *Modus* may be established by the decree of the Court.

It was not proper to pray such a decree, because the plaintiffs have not made proper parties; first, The *Modus* alledged is, that the Rector enjoyed all the meadow called *Dale*, in lieu of all the tithe-hay arising in that parish, and all the land-owners of that parish are not made parties. *Sed non allocatur*; for *Hawkins* and the 33 other defendants are named to be the land-owners of that parish, and although it is not said that they were all the land owners, *non constat* that there are any others, and if there should be, they cannot be bound by the decree, and it shall not be intended, unless it had appeared.

Secondly, It was said that *Rudge* is entitled to an undivided moiety of the purchased lauds, and the other plaintiff is only the surviving trustee of the other moiety, but upon what trusts does not appear, and the *Cestui que Trust* is not before the Court.

To which it was answered, the plaintiff is trustee for persons not *in esse*, and it was declared in the House of Lords by Lord *Hardwicke*, that persons not *in esse* might be bound by a decree; that it had been settled lately in Chancery upon Mr. *Hopkins's*

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Hopkins's will, that till the *Cestui que Trust* appointed by the will should be *in esse*, the estate descended to the heir at law, who was made a defendant, and did not oppose the decree; and being the defendant, though no decree can be for him, yet it would be mischievous if any refusing to be plaintiff, should hinder him who hath a joint interest with him from suing for his right; and it was therefore always thought sufficient to name him a defendant, as he was in this case; but of this the Court took time to consider.

It is to be observed, that the plaintiff comes for a favour, not for the recovery of a right; if the defendant should sue for tithes in specie again, the plaintiff might bar his demand by the same means as before, as it is unlikely that the defendant should again attempt an unsuccessful suit.

Bills of Peace are proper in Equity, but it is where the right has been settled at law by a trial, and appears to be on a good foundation.

Secondly, It does not appear by the bill what interest the parson hath in the meadows of *Dale*, whether he and his successors were to enjoy it.

Thirdly, That the plaintiff is entitled to a moiety only of the estate claimed to be exempt.

Theodofia Skirme Widow, Executrix of Thomas Skirme her Husband, who was Executor of William Wogan, so he was Executor of Dame Mary Wogan, the Widow and Administratrix of Sir William Wogan, and also Executrix of Viscountess Purbeck, her Mother, Plaintiff, *vers.* Essex Marychurch Meyrick Esq. Son and Heir of John Meyrick, Francis Meyrick Gent. John Simmons, John Wogan, and John Langhorne surviving Executor of Anne, Widow and Executrix of John Langhorne, who survived Francis Morgan, the Trustees in the Settlement. 2 April 1710. In Scacc. Case 276.

THE plaintiff by her bill suggests, that *Griffith Lewis* and *Sarah* his daughter, having mortgaged lands in *Com. Carmarthen* to Sir *William Wogan*, after the decease of *Griffith* and Sir *William Wogan*, *John Thomas*, and the said *Sarah* his wife, the daughter and heir of *Griffith Lewis*, by an indenture dated the 26th of *January* 1709, and by a fine, in consideration of 1769*l.* 5*s.* due on the said mortgage, conveyed the said lands, being 80*l.* *per annum* to Dame *Mary Wogan*, widow and administratrix of Sir *William Wogan*, and her heirs.

A person is deemed a trustee, if he takes an inheritance after notice of articles to settle the estate.

The bill was filed in *Michaelmas* Term in 1735.

That by an indenture dated the 2d of *April* 1710, Dame *Mary Wogan* reciting, Sir *William Wogan* intended by will to direct his personal estate to be laid out in lands, to be settled on his nephew *William Wogan*, and afterwards on *Lewis Wogan*, to continue it in his name, but died before the will was made, whereby a moiety of the said personal estate belonged to
Dame

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Dame *Mary Wogan* his widow and administratrix, the other moiety to his nephews *W. Wogan* and *J. Simmons*; and that she was desirous that all parts of the said personal estate belonging to her and the nephew *W. Wogan* should be settled according to the intent of Sir *W. Wogan*, and that she was executrix of Lady *Elizabeth Viscountess Purbeck* her mother, and residuary legatee; and that Lady *Wogan* had agreed to find her house, diet, &c. suitable to her quality, fire, coach, two maids, two servants to attend her on horseback during her life; out of her regard to the memory of Sir *W. Wogan*, and to perform his intent to the said *Lewis Wogan*, and that he might not be wholly deprived of the benefit of the personal estate accruing to her, and judging it not reasonable or just that *W. Wogan* should have the benefit of it, in regard that he neglects to settle his share of it pursuant to such intent; and being minded to settle all the personal estate of Lady Viscountess *Purbeck* to the use of the personal estate of Sir *W. Wogan*, by *J. Langborne*, and *James Wogan*, in behalf of *L. Wogan*, and that *L. Wogan* has agreed to allow her diet, &c. as aforesaid, grants and assigns to *John Langborne* and *James Wogan* all her moiety of all the chattels real and personal of Sir *W. Wogan* and Lady Viscountess *Purbeck*; to hold to them, their executors, administrators, and assigns, in trust for paying the debts of Sir *W. Wogan*, and out of his and Lady *Purbeck's* personal estate to pay 300*l.* to Lady *M. Wogan* for satisfying her debts and Lady Viscountess *Purbeck's*, and then the debts of *Lewis Wogan*; and the residue to lay out in a purchase of lands, to be settled to the use of *Lewis Wogan* for life, with power of waste; then to *W. Wogan* his eldest son in tail male, then to *J. Wogan* his second son in tail male, then to the use of every other son of *Lewis Wogan*, then to the use of him and his heirs.

Dame *M. Wogan* covenants that she hath not done nor will do any act, whereby the personal estate of Sir *W. Wogan* or Lady Viscountess *Purbeck* may be lessened, &c. or not quietly enjoyed by *J. Langborne* and *J. Wogan*; she covenants to make further assurance of all the moiety of Sir *W. Wogan's* personal estate, and of the said *Elizabeth Viscountess Purbeck*;

Lewis

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Others.

Lewis Wogan covenants to indemnify her from charges of all suits about the said personal estates, and to provide her meat, &c. coach, and two servants to attend her, and two maids, and diet, &c. for them during her life.

And if *W. Wogan* settle his share of Sir *W. Wogan's* real and personal estate to the same uses which Sir *W. Wogan* intended by his will, the estate to be purchased by *J. Langborne* and *James Wogan* shall be settled to the same uses.

That *Lewis Wogan* maintained Dame *M. Wogan* till his death, which happened on the 26th of November 1714.

And *J. Meyrick* and *Fran. Meyrick* were her counsel and solicitor in preparing the said deed, dated the 2d of April 1710. by virtue whereof *Lewis Wogan* became entitled to and enjoyed the lands purchased by Dame *M. Wogan* during his life.

That *James Wogan*, trustee in the settlement dated the 2d of April 1710. died in the life-time of *Lewis Wogan*, and *J. Langborne* the other trustee died, and made *Anne* his wife executrix, who made *J. Meyrick* the defendant, *J. Langborne* and *W. Bowen*, executors.

That *Lewis Wogan* left issue *W. Wogan* and *J. Wogan*, both infants, after whose death *J. Meyrick* and *Fran. Meyrick*, or one of them, entered on behalf of *W. Wogan*, the eldest son of *Lewis Wogan*, then an infant, into the lands so purchased by Dame *M. Wogan*, in 1709. with the personal estate of Sir *W. Wogan*, and ought to account for the same to his representatives till his death, which happened on the 20th of March 1728.

That Dame *M. Wogan*, as administratrix of Sir *W. Wogan* was possessed of a lease of the tithes of *Llangadock*, granted by the Bishop of *St. David's*, value 100*l.* per ann. into which *J. Meyrick* or *F. Meyrick* entered, and received the profits for *W. Wogan* the infant, *F. Meyrick* acting as agent for *Anne Langborne* and her executors.

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That Dame *M. Wogan* having an annuity or rent-charge granted her for her life by Sir *W. Wogan* of 200*l.* per ann. out of lands in *Pembroke, Carm'* and *Cardigan*, confessed a judgment to *J. Meyrick*, in *Michaelmas Term 4 Geo.* in the Court of Exchequer for 578*l.* on pretence of monies due to him for two years board, which he agreed to accept out of the arrears of the said annuity, which he received from *Mich. 1714.* till her death, which happened on the 26th of *November 1724.*

That Dame *M. Wogan* made the said *W. Wogan* her executor and residuary legatee, who by will devised all his real estate to *J. Wogan* and his heirs, and made *Tho. Skirme* husband of the plaintiff his executor and residuary legatee, who in 1731. made the plaintiff his executrix and residuary legatee.

That *F. Meyrick* never accounted for interest by him received from Mr. *Harley* for 1100*l.* due to Sir *W. Wogan* on mortgage, viz. 55*l.* on the 20th of *July 1716.* 50*l.* on the 7th of *March 1717.* 50*l.* on the 29th of *July 1718.* 120*l.* on the 21st of *December 1718.* That *J. Meyrick* died in 1731. having made the defendant *Effex M. Meyrick* executor, and subjected his real estate to the payment of his debts.

Wherefore the plaintiff demands, first, That the defendant *Effex M. Meyrick* and *F. Meyrick* should account with her for the profits of the estate in *Com' Carm'* from the death of *Lewis Wogan* to the death of *W. Wogan* his son.

Secondly, That *F. Meyrick* should account for the tithes of *Langadock* by him received during that time.

Thirdly, That he should account for the interest of 1100*l.* by him received of *Edward Harley*, Esq;

Fourthly, That the defendants should set forth what was due to *J. Meyrick* to whom a judgment was given from Dame *M. Wogan* and whether he was not satisfied the same out of the arrears of her annuity of 200*l.* by him received, or other

other estate, and if any thing remain due on it; that *J. Wogan's* tenement called *Sander's* tenement, devised to him by *W. Wogan*, may go toward satisfaction.

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That *J. Simmons* the devisee of *W. Wogan*, the nephew of Sir *W. Wogan* to whom the land out of which the 200*l.* per annum issues was given, may account for the arrears of the said annuity.

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The defendant *Essex M. Meyrick* by his answer admits that Dame *M. Wogan* by indenture dated the 20th and 21st of June 1715. conveyed the lands in Com' *Carmarthen* to *J. and Fra. Meyrick* and their heirs for 50*l.* and out of kindness to them, and that they had from that time received the profits.

That Dame *M. Wogan* dwelt at *J. Meyrick's* house two years and a half, and after the 5th of August 1717. went to dwell at *Haverford West*, and being indebted for her board there in 257*l.* 10*s.* and to *Fra. Meyrick* 32*l.* on the 9th of October 1717. executed a warrant of attorney to confess judgment in the Exchequer for securing that money, viz. 289*l.* which is still due, and the judgment was entered up.

And the defendant *F. Meyrick* admits that the mortgage from *Griffith Lewis* and his daughter was made for 1200*l.* the money of Sir *W. Wogan*, to *W. Wogan*, Esq; and — *Welly* as his trustees, and on her purchasing the inheritance she insisted on 100*l.* more than what was due for principal and interest on the mortgage; that *J. Meyrick* and he were privy to her purchase, and to the deed of the 2nd of April 1710. but took not her purchase to be included in the deed.

Francis Meyrick also admits, that by authority from Dame *M. Wogan* he received several parts of the personal estate of Sir *W. Wogan* and Lady *Purbeck*, but on the 21st of December 1717. stated accounts with her, when there was found due to him on the ballance 207*l.* 3*s.* 5*d.* in which

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account the rents of the tithes of *Langadock* were included, and that 282*l.* 1*s.* 10*d.* being due to him from *J. Simmons* the other nephew of Sir *W. Wogan*, which he might receive out of the share of the personal estate of Sir *W. Wogan*, payable to him by Dame *M. Wogan* she agreed that the defendant should receive both sums out of what he should afterwards receive out of such personal estate, and the rents of the said tithes, for which he submits to account.

That by deed dated the 9th of *October* 1717. (being on the same day with the warrant of attorney to confess judgment) reciting the indenture of the 4th of *July* 1716. whereby Dame *M. Wogan* had given *J. Meyrick* 100*l.* to be received out of the arrears of her annuity, and agreed to pay him 100*l.* *per ann.* for her board, and had given all monies due to her from any person, except a debt from *Tho. Cornwallis*, ratified the said gifts, and released the future payments of 100*l.* *per ann.* and she covenanted to pay the 284*l.* for which a warrant of attorney was given, out of the said arrears.

On hearing this cause it was first objected, that here was want of parties, because the mortgage made by *John Thomas* and *Sarah* his wife was to *W. Wogan* and — *Welly* for a term, and no declaration of trust appearing for Sir *W. Wogan*, they ought to have been parties.

Sed non allocatur; for the account demanded by the plaintiff against the defendants, is of the rents and profits of the estate of Sir *W. Wogan*, and of this mortgaged land as part of Sir *William's* personal estate; and the defendants admit, that the money put out on this mortgage was part of Sir *W. Wogan's* money, and the names of *W. Wogan* and *Welly* were used as trustees for him; but insisted, that Dame *M. Wogan* purchased the inheritance of this estate, and conveyed it to them in 1715, whereas the plaintiff insists that she had before agreed to convey it to *Thomas Lewis*, whose representative she is; so the whole question between the parties is, Whether this estate in *Com' Carmarthen* belongs to those who claim under the deed of 1710, or the parties to

whom it was conveyed in 1715? And whatever is determined in this question, cannot affect *W. Wogan* or *Welly*, for they will not be bound by the decree; and if not trustees for Sir *W. Wogan* cannot be affected by it; for it is a known rule, that none can be bound by the decree but such as are parties or privies to the suit.

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And it would be hard to dismiss the plaintiff for want of parties, where the defendants admit that the plaintiff is entitled to make the demand against them, in case the ground on which the demand is founded be true; and none can be prejudiced, who are not parties, by the decree of the Court upon that point.

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Afterwards, at the sittings after *Hilary* Term, the cause came on to be heard upon the merits.

And the first part of the plaintiff's demand was, an account of the profits of the estate in *Com' Carmarthen*, from the death of *Lewis Wogan*, which happened on the 26th of *November* 1714. to the death of *W. Wogan* his son, which took place on the 20th of *March* 1728; for the plaintiff being the representative of *W. Wogan*, on whom the personal estate of Sir *W. Wogan* was agreed to be settled after his father's decease by the indenture dated the 2nd of *April* 1710. was intitled to this estate, which was a mortgage to *W. Wogan*, though conveyed to Dame *M. Wogan* in 1729. and by her conveyed to *James* and *Francis Meyrick*, and their heirs, by indenture dated the 20th and 21st of *June* 1715; for *Meyrick* having notice of this settlement dated the 2d of *April* 1710. took the profits subject to the trusts of that deed, and consequently his executors *Essex M. Meyrick* and *F. Meyrick* ought to account for the profits by him received in the life of *W. Wogan*.

Now it appears, that by the deed dated the 2nd of *April* 1710. Dame *M. Wogan* admits by the recital, that Sir *W. Wogan* designed that all his personal estate should be laid out in land to be settled in his name; that she in respect to his memory importuned his nephew *W. Wogan*, that all the

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parts of the said Sir *William*'s personal estate belonging to her and him might be so disposed, but he refuses; that she was minded to settle all the estate of Lady Viscountess *Purbeck* and her moiety of Sir *W. Wogan*'s personal estate; and therefore of intent to settle such part of the personal estate as belongs to her, she assigns all her moiety of the judgment, mortgages, &c. and all and singular other real and personal estate of Sir *W. Wogan* and Lady *Purbeck*'s personal estate, upon the trusts therein mentioned, and covenants that she had not done, nor would do any act by means whereof the personal estate of Sir *W. Wogan* and Lady *Purbeck* are or shall be lessened, impaired, &c. or defeated.

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It is evident by these words, that the whole personal estate of the said Sir *William Wogan* was agreed to be settled upon the trusts of this deed; and it is plain upon the proofs in the cause, that *Lewis Wogan* took the profits of this estate in Com' *Carmarthen* while he lived; that the inheritance was conveyed to Lady *Wogan* on the consideration of what was due on the mortgage for a term of years to *William Wogan* and *Welly*, trustees for Sir *William Wogan*, and consequently was part of his personal estate; and though 100*l.* is said to be insisted on, yet nothing more appears to be paid for the purchase of such inheritance; that *John* and *Francis Meyrick* were privy to, and preparers of the deed of the 2nd of *April* 1710.

So that there can be no doubt, but that on a bill by *Lewis Wogan*, or his son *William Wogan*, against *John* and *Francis Meyrick*, (admitting that this deed of the 2nd of *April* 1710. was made on a good and valuable consideration) a court of equity would have decreed this estate to have been conveyed to the trustees upon the trusts of that deed.

It was insisted, that *Lewis Wogan* is to be considered as a purchaser; for the deed by *Lewis Wogan*, dated the 2nd of *April* 1710. was out of respect to the memory, and to fulfil the design of Sir *William Wogan*, who had an intention by will

will to order his personal estate to be laid out in lands, for the benefit of *William Wogan* his nephew, and of *Lewis Wogan* and their male issues, and to continue it in his name;

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And in consideration of a covenant by *Lewis Wogan*, that he, his heirs, executors and administrators, would provide diet in his house in *Wiston* for Lady *Wogan*, during her life, suitable to her quality, and two maid servants and two men servants, with coach and horses to attend her.

Now, although a court of equity does not usually decree the execution of a covenant or agreement made without any consideration; yet a slender consideration may suffice to carry the agreement into execution; as if it be made for the provision of younger children, for affection to a man's nephew, and in order to produce a reconciliation between him and his father. 1 *Eq. Abr.* 16. (a)

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(a) 1 Ch. Rep.
158. S. C.

Here the consideration of the agreement by Dame *Mary Wogan*, is to accomplish what her husband intended to do by his will, but was prevented by death, and the covenant of *Lewis Wogan* to provide for her during her life; which are undoubtedly sufficient considerations to enforce the execution of the agreement of the 2nd of *April 1710*.

However it may well be doubted whether Lady *Wogan* understood that she was to give up the inheritance which had been conveyed to her of the lands in *Com' Carmarthen*, for the deed of the 2nd of *April 1710* recites, that Sir *William Wogan* died possessed of a considerable personal estate, consisting in leases, mortgages, judgments, statutes, bonds, &c. that she was minded to settle all her moiety, part of the said personal estate, then assigns all her moiety of the said mortgages, judgments, statutes, bonds, chattels real and personal of the said Sir *William Wogan*, &c.

Now although the generality of the words, with the covenant that she had done no act to lessen Sir *William Wogan's* personal estate, are sufficient in equity to oblige the trans-

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ferring the lands in *Com' Carmarthen*, for the benefit of creditors and purchasers of Sir *William's* personal estate for a valuable consideration, notwithstanding her having the inheritance of that estate conveyed to her; yet having the inheritance, she might possibly be unknowing that that continued still a mortgage; it had, it is certain, been fairer to have been more explicit in this matter; it is certain that Lady *Wogan* was a woman very easily imposed on; and it does not appear that *Lewis Wogan* was less eager to make advantages of her weakness than *Meyrick*; for first, the assignment was of this personal estate immediately for the benefit of *Lewis Wogan*, which was not agreeable to the design of Sir *W. Wogan*, as recited in this deed, which was first to settle it on *W. Wogan* his nephew and his issues, but he is omitted, and the deed directs the personal estate first for the benefit of *Lewis Wogan*; the pretence for this is, that *W. Wogan* refused to settle his share of the personal estate to the same uses. But if it was Sir *W. Wogan's* intent to settle the whole first on his nephew, it was departing from that intent, to settle her part different from those uses to which he meant his estate should go.

Secondly, The consideration of this deed on the part of *Lewis Wogan* was to maintain the lady during her life, in the manner mentioned in the articles. But it appears that he took no care for that maintenance being secured to her, so that after his decease she dwelt with *Meyrick* two years and a half; so that although *Meyrick* was perhaps more imposing, *Lewis Wogan* was not so free from all imposition as was fit that he should have been

But in this case it is to be considered, whether the plaintiff is not barred by the statute of limitations, for *Lewis Wogan* died in 1714. and *W. Wogan* his son was then about the age of fourteen or fifteen, and he died on the 20th of *March* 1728. so that he died above six years after his full age; for he must have been of age in 1700. and the bill was not filed till *Michaelmas* Term in 1735. so that if it should be allowed, that the statute of limitation does not extend to
a trust,

a trust, and *Meyrick* having notice of the articles in 1710. was a trustee for *W. Wogan* the infant, as being a trustee by his enjoyment of this estate in *Com' Carmarthen*, which was purchased by, and consequently part of the personal estate of Sir *W. Wogan*, which by these articles *W. Wogan* ought to enjoy; yet by his death that trust was intirely determined, and consequently six years have elapsed since the last period of that time for which the present plaintiff demands an account.

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Although the statute of limitation does not extend to a trust, 1 *Eq. Abr. (a)* 303. and admitting *Meyrick* to be a trustee, and * that the statute runs not upon him 'till after the full age of *W. Wogan*, while the trust was continuing, which may be looked upon in the nature of an account current, and if a man receives the profits of an infant's estate, and continues so to do for several years after his full age, he shall be accountable for what he receives after as well as during his infancy. 1 *Eq. Abr.* 7.

The statute of limitations extends not to a trust.
1 Ch. Caf. 26.
(a) 1 Ch. Caf. 20.
2 Freem. 156.
3 Ch. Rep. 8.
S. C.

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Yet when the trust is wholly determined, the statute must then run upon the plaintiff's demand, or where will it stop? if the suit may be brought after six, it may be after twenty-six years.

The statute 21 *Jac. c.* 16. saith, all actions of account and on the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factor or servant) shall be brought in six years, &c. yet if there be an account stated between merchants, the statute extends to it, as was resolved (b) 2 *Sand.* 124. in the case of *Webber* and *Tivel*, 1 *Lev.* 287. S. C. and the reason given by *Jones* who argued for the plaintiff, is, that the statute intended to except only accounts current and continuing between merchants, but when the account is settled and ascertained it becomes as a fixed debt.

(b) 2 K. b. 622.
634. S. C.

So in the case of *Martin* vers. *Delboe* (c) 1 *Lev.* 298. 1 *Mod.* 70. S. C. where the like plea was to an action of

(c) 1 Sid. 465.
1 Vent. 89.
2 K. b. 674.
696. 717. S. C.

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(a) Holt 427.
1 Show. 341.
Carth. 226.
S. C.

(b) 1 Mod. 268.
S. C.

The stat. of li-
mitations is as
well a bar in
equity as at
law.

2 Burr. 961.

1 P. Wms. 744.

3 P. Wms. 309.

2 Atk. 395.

Mitford 2d. edit.

212.

2 Ld. Raym.

935. cont.

Affumpsit on an account between merchants, the plaintiff discontinued; and so it was resolved in the case of *Chevely* vers. *Band*, 4 Mod. 105. (a) and so it was agreed in the case of *Partington* vers. *Lee*, 2 Mod. (b) 311.

And the statute of limitations is as well a bar in equity as at law. A bill in Chancery in the case of *Sir George Sands* vers. *Blodwell*, 1 Jon. 401. for an account between merchants was brought against an executor, and the statute of limitations pleaded; and it was referred to three judges, *Jones*, *Crook* and *Barkely* for their opinion; indeed there the account was not finished, for *Freeman*, one merchant, owned 1200*l.* due, and the other insisted on more, and the account not being settled or ended, the Judges thought the account not barred by the statute, but no doubt was but that the statute would have been a bar in equity as well as at law, if the account had been determined. (1)

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In the case of *Sherman* vers. *Withers*, Mich. 21 Car. 2. 1 Ch. Caf. 152. a bill was brought by an inland merchant against the defendant his factor, for an account of fourteen years standing, who pleaded the statute, which was allowed; for the Lord Keeper was of opinion that the exception in the statute extended not to this case, but only to merchants trading beyond sea.

So if one receives the profits of an infant's estate, and six years pass after his full age, a bill in Chancery to account shall be barred by the statute of limitations as much as an action at common law; for this receipt of the profits of an infant's estate is not such a trust as being a creature of a Court of Equity the statute is no bar to; and since he might have had his action of account at common law, there was no necessity to come into equity. *Trin.* 1719, *Locky* and *Locky*, 1 Eq. Abr. 304. pl. 10. *Pr. Cha.* 518. S. C.

(1) It was determined, in the case of *Wych* vers. *East-India Company*, 3 P. Wms. 309. that where an executor, administrator, or trustee for an infant neglects to sue within six years the statute of limitations shall bind the infant.

But a difference was suggested, where a matter is of such a nature that a remedy lies at law as well as in equity; there if the party pursues his remedy in equity, he shall be barred by the statute of limitations as well as if he sued at law; but otherwise it is, where the party has no remedy but in a Court of Equity.

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However it is to be considered, that though the statute 21 Jac. r. 16. does not mention suits in equity, yet they are construed to be in it; *per* Lord Chancellor *Macclesfield*, *Mich.* 1721. The statute of limitations speaks nothing of bills in equity, yet these are construed to be within it.

1 P. Wms. 744.

In that case the statute was pleaded to a bill of revivor after a decree to account, and Lord *Macclesfield* says, if the suit had been on bill and answer, it could not have been doubted but the plea had been good, for it was within all the mischiefs designed to be prevented by the statute, when vouchers are lost and witnesses are dead.

But, being after a decree to account, which is in the nature of a judgment, he doubted, and ordered it to be spoken to again; after which the defendant died, and one *Beecher* administering to him, the plaintiff brought another bill of revivor; whereupon the defendant *Beecher* pleaded the statute of limitations, and coming to be argued before Lord Chancellor *King* in *Mich.* 1727. his Lordship disallowed the plea, saying that a bill of revivor after a decree to account was in the nature of a *Scire Facias*, and not within or barable by the statute of limitations. (a)

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The statute of limitations, after twenty years possession by a mortgagee, was pleaded in bar to a bill to redeem.

(a) 1 P. Wms.
745.

3 Atk. 225.
Mittord 213.

Vide the case of *Sherman and Withers*, *supra*, *Mich.* 21 Car. 2. Where the statute was pleaded to a bill by an inland merchant against his factor for an account of fourteen years standing, and was allowed.

Supra p. 711.

Case 277. Howarth Cook and John Cook *vers.* Sarah Cook Widow, Hannah and Sarah her Daughters, Infants. In Scacc'.

Whether a defendant after a decree against him shall, before execution sued, by alienation prevent the plaintiff from taking his lands upon the sequestration. 2 Eq. Abr. 711. pl. 6. S. C.

ON a bill for a personal duty, a decree was against *Sarah Cook* the mother, who stood out in contempt, but before sequestration against her, she, being tenant for life, remainder to ——— by feoffment, dated the 28th of *September* 1735, infeoffed trustees in consideration of 5*s.* and in consideration of 400*l.* part of a considerable sum recited to be due to her daughters; and thereby conveyed her estate for life to the said trustees, in trust for her daughters and their heirs.

Afterwards sequestration was taken out against the mother, and thereon this estate was seized by the sequestrators; but on an application to the Court, by order the 29th of *January* 1736. it was referred to the deputy to examine into the conveyance, and see what interest the defendants had in the estate; who reported, that *Price* and his wife (for he had married *Hannah* the eldest daughter) and *Sarah Cook* the other daughter, had not made out any sufficient title, whereby to impeach or affect the plaintiffs' seizure of the said estate by virtue of the sequestration issued in this cause.

[713] To this report the plaintiff took exception in writing (as of late directed) first, That before the decree, the estate was settled for the jointure of the mother for her life; that the feoffment was made before the sequestration issued, and made *bonâ fide* for a valuable consideration.

It was insisted by Mr. *Wilbraham*, that the decree does not bind the land, nor is any lien upon it, but only binds the person of the defendant.

It must be agreed, that a decree in a Court of Equity being no court of record, does not in point of law bind the land, but the person only.

So

So it is said *per* the Master of the Rolls, in the case of *Bligh & al' vers. Earl of Darnly, Trin. 1731. 2 F. Wms. 619.* (a) the defendant's father contracted before a master for the purchase of a third part of *Cobham-Hall* in *Kent*; and it was insisted by the Attorney General, that the debt by this contract being due by a decree, it was in the nature of a judgment, and would bind the real assets in the hand of the heir.

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(a) 2 Eq. Abr.
712. pl. 7. S. C.

But the Master of the Rolls said, that the purchase of land decreed to be sold, creates no debt by the decree, it is only payable by the order of the Court; but when it is said that a debt by a decree is equal to a judgment, (b) and to be paid next to a judgment, (c) this is intended out of the personal estate; for a decree for a debt does not bind the real estate, (d) acting only *in personam* not *in rem*, and the remedy to affect land is only by sequestration for a contempt, and a decree for a debt never affects the land in the hands of the heir.

(b) 2 Salk. 507.
2 Vern. 89.
1 Ves. 214.
(c) 1 Vern.
143.
(d) 1 Ves.
496.
Forrest. 222.

And this was said long ago by *Knightly, 27 H. 8. 15.* cited in *1 Rol. Abr. 373.* and it was agreed in *1 Rol. Rep. 36.* But the question in this case is, Whether the defendant, after a decree against him, shall by alienation before execution sued prevent the plaintiff from taking these lands upon the sequestration?

It is agreed *Hil. 32 Car. 2.* in the case of *Coffin vers. Gardiner, 2 Ch. Caf. 43.* that he cannot do so, if the alienation be voluntary without consideration; and so it was holden, where after a decree to an account of a personal estate, and on exception to the master's report it was deferred, and in the mean time the defendant, on treaty of a marriage for his son, but before it was concluded, conveyed his estate to his son to enable him to make a jointure, and to pay his debts *1700 l.* but with power of revocation, if his son died without issue.

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So in the case of *Squib and Snelling, 2 Ch. Caf. 47.* it is said, a purchaser from *J. S.* who had a decree against him

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in Chancery for land, shall be bound by the decree, though he had never notice of it, though the decree binds the person, and not the land.

So where a decree was made by commissioners of charitable uses, and exceptions were made to it in Chancery, where the decree was afterwards confirmed; but the defendant in the mean time had conveyed his land to raise portions for children, but with a power of revocation, the land shall be sequestered for money decreed. *Pasch. 32 Car.*

(a) 2 Ch. Caf.
34.

2. (a) *Harding and Edge.*

So where the defendant being decreed to pay a sum of money, or deliver up possession of a house and land in *Edmonton*, made an assignment of the house and land to a real creditor on bond, for satisfaction of his debt of his own free will, without privity of the creditor, after the time set for paying the money or delivering possession, the Court decreed the possession of the house and land without regard to the conveyance. *Self and Maddox*, 1 *Vern.* 459. and the case of *Colston and Gardiner*, *supra*, was cited and allowed.

So where a decree was, that the devisee should enjoy against the heir; A. purchases in a mortgage, then purchases the equity of redemption of the heir, having notice of the will, which was said to be destroyed, the Court determined that he should be bound by the decree, 1690. *Finch* vers.

(b) 1 Eq. Abr.
332. pl. 5. S. C.

Newnham, (b) 2 *Vern.* 216.

Termino Pasch.

13 Geo. II.

Owens *verſ.* Sarah Smith Executrix of Thomas Smith. In Scacc'. Case 278.

THIS was a bill for the discovery of Affets; and it was suggested, that the plaintiff had applied to one *Matthews* to be his attorney in an action of assault and battery by the plaintiff against *Thomas Smith*, and upon a treaty of accommodation between them, it was agreed, that the plaintiff should pay *Smith* 50s. toward the expences, and that *Smith* should pay the Attorney's bill, who delivers a bill of 10*l.* 10*s.* 2*d.* but *Smith* dies before the payment to him of 50*s.* or payment by him of the charges.

Where a demand is below the dignity of the Court, the bill shall be dismissed without entering into the merits.

The defendant admits affets, and that she found such a bill among her husband's papers, but looked on it as an unreasonable bill.

The plaintiff brings on the cause to an hearing, not content with the discovery; and it was insisted by *Mr. Wilbraham* for the plaintiff, that where the bill was for a discovery, the plaintiff might have relief for a debt or demand certain, or which might be made certain; that in this case the attorney's bill, though not taxed, might be ascertained by the officer of this Court who frequently taxed bills for proceeding at law as well as in equity.

It was admitted, that if a bill in equity was necessary for a discovery, the plaintiff might have a decree for the demand

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demand in case it was certain, and admitted to be due, which was to avoid a multiplicity of suits.

But here the plaintiff had a plain remedy at law, and the demand was not ascertained nor admitted, for though a bill was delivered, that does not prove so much to be due, and the answer saith that it is unreasonable; and although matters of law and equity are contained in a bill, the whole may be referred to an officer of the Court, yet that is not so proper where the whole is a transaction at law.

And here the plaintiff's demand is but 10*l.* 10*s.* 2*d.* which is a cause beneath the dignity of the Court; so the bill was dismissed.

**Case 279. Hutchins *vers.* Fitzwater Foy and Josias Gover.
In Scacc'.**

Where an interest is actually vested in any one, it will go to their executors, otherwise not.

THIS was a bill for a legacy of 50*l.* charged on an estate devised in remainder to the defendant *Foy* and his heirs, to be paid to *Margaret*, wife of *Gover*, who took out administration to his wife, and in satisfaction of some money which he owed the plaintiff, assigned it to him.

And the case was, That a man seised of lands in fee, by will dated the 3d of *July* 1732. devises all his real and personal estate to *Thomas Beal* for life, and afterwards to his children, and for want of such issue, to his sister *Martha* for life, and after her decease, to *John Beal* for life, and then to his children, and for want of such issue, part of his real estate called *Monks* to *W.* and his heirs; the other part called *Marsh*, to the defendant *Fitzwater Foy* and his heirs, paying out of it, when it falls, 500*l.* viz. 100*l.* to *S. D.* 150*l.* to *W.* and *O.* 100*l.* to *N.* and 50*l.* a-piece to *Elizabeth*, *Mary* and *Margaret*, the three daughters of his sister.

The

The testator died in 1732, *John Beal* died without issue, and his sister *Martha* died in his life-time; *Margaret*, one of the three daughters, married the defendant *Josias Gover*, and died in December 1734; *Thomas Beal* died without issue in 1736, whereby the defendant *Foy* came to the possession of the estate devised to him and his heirs, and *Gover* having taken out administration to his wife, assigned to the plaintiff the 5*o*l. payable to the wife.

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It was insisted by Mr. *Bootle* and Mr. *Gundry*, that *Margaret* died before the remainder fell into possession, and that the legacy or payment to her was lapsed, for it was to be paid out of the profits when it fell, and consequently could not vest in her till then.

That the antecedent estates to *Thomas* and *J. Beal* and their issues might have lasted many hundred years, and therefore it was uncertain, and a contingency whether it ever would happen.

Secondly, That here was no devise of any money to *Margaret*, but only a condition annexed to the estate of the defendant, paying in a will making a condition, for breach of which the heir might enter, but a stranger cannot take advantage of it. *Co. Lit.* 203.

Thirdly, That here the charge does not begin till the estate falls in possession, and then *Margaret* being dead could take nothing, the time is not annexed to the payment but to the devise, for nothing was devised before.

Fourthly, The devise is too remote, after a dying without issue, which may never happen.

The case of *Carter and Bletsoe*, 2 *Vern.* 617. (a) may be compared to this; *Mat. Bletsoe* devised all his messuages, &c. to his eldest son and his heirs, but it is my will that my son shall pay out of the said lands 600*l.*; to my daughter *Mary* 200*l.* at her age of 21; to my son *J.* 200*l.* at 21; to son *Mat.*

(a) *Prec. Cha.*
267.
2 *Eq. Abr.* 540.
pl. 5.
Eq. Rep. 11.

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Mat. 200*l.* at his age of 21. and 4*l.* *per ann.* for maintenance till 21, and the portions paid.

Mary married, and died before 21, her husband took out administration; but *per cur.* there is no vesting clause in the will, the direction that his son should pay *Mary* at the age of 21, vests nothing till she attain her age of 21; and she dying before, it never arises.

(a) 1 Atk. 510.

So in the case of (a) *Van and Clark*, in Chancery, on the 24th of *July* 1739, upon the will of Lady *Mary Green*, dated the 11th of *December* 1729, whereby she devised the sum of 2000*l.* *inter al.* out of her real and personal estate unto *Thomas Lewis*, on trust to put out to interest, till *Mary Lewis*, grandchild of her sister *Beecher*, attain the age of 18, or marry, and when she attains that age, or marries, to pay it her.

She died before her age of 18 and before marriage; and the Court held that she was not entitled to this legacy, but dismissed the bill brought by her administrator for that purpose, without costs.

(b) 1 Atk. 482.

So in the case of (b) *Prouse and Abindon*, in Chancery, on the 26th of *April* 1728, *Thomas Compton*, by will dated the 13th of *August* 1718, devised part of his real estate to trustees and their heirs, on trust to pay the sum of 500*l.* unto his godson *Thomas Prouse*, to be paid to him at his age of 21 years, or marriage; he died under age and unmarried; and it was holden that the money should not be raised, but sunk for the benefit of the heir.

(c) 1 Atk. 502.
2 Eq. Abr. 550.
pl. 30.
3 Vez. 48.

In the case of (c) *Hall and Terry*, which was heard by Lord *Hardwicke* on the 8th of *November* 1738.

Nicholas Terry devised lands to *Stephen Terry* and his heirs, so as he, his heirs, or assigns, do in 12 months after the estate shall come unto him (which was on his wife's decease) pay unto his grandchild, after named *Elizabeth Oades*, the sum of 250*l.* The testator died in — 1714, *Elizabeth* died within 12 months after the wife; and it was holden by the Court, that

that nothing became due to the executor, for there was nothing devised till the 12 months expired, for the devise and time of payment commenced together, and the will could not have a double effect to give and vest an interest, and then give direction as to the payment.

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FOX.

But on the other side it was answered, and resolved by the Court, that in this case the plaintiff was well entitled to the legacy of 50*l.* assigned to him by the husband and administrators of *Margaret*.

It is indeed now a settled rule in Courts of Equity, that where a devise or settlement of lands is made by will or deed, charged with portions for younger children, payable at age or marriage, the portion shall sink in the estate for the benefit of the heir or devisee, in case the child die before the portion becomes payable; it was so holden in the case of *Pawlet* *vers.* *Pawlet*, which was affirmed in the House of Lords. 1 *Ver.* 204. 321. 2 *Vent.* 366. 1 *Eq. Abr.* (a) 267. (1)

Where money is given by will or deed to be paid out of a real estate at a future time, if the person dies before the time it shall sink into the estate.

1 Atk. 501.
Supra, p. 742.
2 P. Wms. 276.
610. 3.
1 P. Wms. 134.
Rep. 286. S. C.

(a) 2 *Ficm.* 93. 2 Ch.

There was formerly a difference taken and insisted on, between lands devised and lands settled by deed; but it is now clearly settled that the case is the same in both, for the reason is the same; for in both cases it appears, that it was the intention of him who made the will or settlement, that the monies appointed to be raised, should be a provision for the settling of these children in the world; but if they died before there was occasion for such provision, there is no need to raise the portions.

There is now no difference whether lands are devised or settled by deed for this purpose.

(1) If the portion is payable out of personal property, the administrator, upon the legatee's dying before the age of twenty-one, may demand it. 1 *Ld.* Raym. 503. 2 P. Wms. 276, 610. 3 P. Wms. 138. 1 *Vern.* 204.

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(a) 1 Eq. Abr.
267. pl. 5 268.
pl. 4. S. C.
(b) Pre. Ch.
140.
12 Mod. 276.
2 Eq. Abr. 653.
pl. 3.
1 Ld. Raym.
508. 2 Freem. 243. S. C. (c) 2 Freem. 254. 1 Eq. Abr. 267. pl. 2. S. C. (d) 2 Eq. Abr. 654.
pl. 6. S. C. (e) Prec. Ch. 213. 1 Eq. Abr. 267. pl. 3. S. C. (f) 1 Eq. Abr. 268. pl. 5. S. C.

Cases to this effect are numerous, *Smith and Smith*, (a) 2 *Vern.* 92, 416. (b) So in the case of *Bruen and Bruen*, 2 *Vern.* 439. *Pre. Cha.* 195. (c) S. C. *Tournay and Tournay*, (d) *Pre. Cha.* 290. *Warr and Warr*, (e) *Hil.* 1702. *Edwards and Freeman*, *Mich.* 1727. 1 *Eq. Abr.* 267, 268. *Norfolk and Gifford*, 2 *Vern.* 208. (f)

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The cases cited by Mr. *Gundry* went on the same foundation; in the case of *Carter and Bletsfoe*, 2 *Vern.* 617. the devise was to his eldest son, and the testator wills that he should pay 200*l.* to his daughter *Mary* at 21, or at her marriage, which was plainly intended as a provision for her at her full age or at her marriage, and therefore if she died before, there was no occasion for it.

What was said by the Court, that there was a vesting clause, was a reason *ex abundanti*, for properly speaking, the portion is not intended to vest in the intent of the testator till it becomes payable.

The cases of *Van and Clark*, and *Prouse and Abingdon*, went on the same reason.

The case of *Hall and Terry* seems to be parallel to that of *Bruen and Bruen*, 2 *Vern.* 439. where the father having by marriage settlement created a term to raise 3000*l.* for his daughters' portions, having but one daughter, devises his lands to trustees, on trust to make good his wife's portion, and raise the 3000*l.* in 12 months after the death of him and his wife; the daughter dies within the year, as appears from 1. *Eq. Abr.* 267. (though not taken notice of by Mr. *Vernon*) and so the portion was not raised. So in the case of *Hall and Terry*, the granddaughter dying before the year, the time appointed for raising it, it was not payable.

But

But even in wills or settlements, if the money devised or directed to be raised be actually vested, and the interest fixed in the party, it is to be raised though the party die before the time limited for the payment,

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Therefore Mr. *Boote* made the right distinction, whether this 50*l.* to *Margaret* was charged or vested in her, or not? For if it be a present charge by the will, and the interest vested in her, it must belong to her administrator, and consequently to the plaintiff in equity.

In the case of the Earl of *Rivers* and the Earl of *Darby*, 2 *Vern.* 72. (a) — land was limited to *A.* for life, then to his wife for life; remainder to his first and other sons in tail male; remainder to trustees in fee; provided if there is no issue male, to raise out of the profits 10,000*l.* for his daughter, who by will at 17. disposes of it to her mother. And it was decreed to the devisee, because it was an interest vested in the daughter, though she died under age.

(a) 1 Eq. Abr.
268. pl. 7. S. C.

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So where land was devised to *A.* for life, remainder to *B.* in fee, he paying 400*l.* whereof 200*l.* was to be at the disposal of his wife by will as she should think fit; this being an absolute disposition to the wife, though she made no will, went to her administrator. 2 *Vern.* 181. (b) *Robinson* and *Dufgale*.

(b) 1 Eq. Abr.
201. pl. 16.
S. C.

But this is a stronger case, for here the defendant takes the remainder charged with these payments; the same will which vests the remainder in him, vests it subject to this charge, and if he takes, he must take it *cum onere*.

It is objected, that the charge does not commence till the remainder comes in possession, for the payment is to be out of the rents. It is true, that the money cannot be demanded till the defendant can pay it out of the profits; but it is a present estate in *Foy*, and consequently a present interest in *Margaret*, though *solvend. in futuro*. It cannot be doubted but that *Foy* might by will devise his remainder; but by the statute of wills no devise can be made but by a person having the estate;

1 H. 81. 30.
3 term Rep. 28.

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and if he had devised it, it would have been subject to this charge.

So *Margaret* in her life might have released this interest, but none can release what he has no present right to. He may release an interest, though it be future or merely possible, but cannot release where he has no present right or interest.

And the Court was of opinion that *Foy* was compellable in equity to pay this 50*l.* to the plaintiff; and I delivered the opinion of the Court to the effect following:

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If a man by settlement charges his lands with the payment of portions of daughters or younger children, to be paid at the age of twenty-one or marriage, and the daughters or child die before the time limited for payment, the portion shall not go to the administrator of the daughter, but sink in the inheritance for the benefit of the heir. *Pawlett* and *Pawlett*, affirmed in the House of Lords. 2 *Vent.* 366. 1 *Vern.* 204. 321.

And there is no difference between lands devised for payment of portions, and where by settlement. 2 *Vern.* 92. *Smith* and *Smith*, 2 *Vern.* 416.

Another difference settled in equity is between a legacy, or sum of money vested before the death of the legatee, and where it is not vested; if the legatory dies before the legacy vested, it shall not go to the executor or administrator; but if it be vested before his death it shall.

And this not only in pecuniary legacies, as where 100*l.* is given to an infant at his age of twenty-one, and where given to be paid at the age of twenty-one; in the first case, if he die before that age, it shall go to the administrator, in the other not.

not. *Dyer*, 59. b. *Vide* in margin. (2) Resolved 2 *Vent.* HUTCHINS v. Fov.
(a) 342. 366.

2 *Eq. Abr.* 539. pl. 1. 2 *Freem.* 24. 2 *Vern.* 199. 2 *Ch. Cal.* 155. *Infra*, p. 737.

And if devised to be paid with interest, that imports that it should vest presently. *Skin.* 147. 2 *Vern.* (b) 137. 508, 673. (c)

(a) 1 *Eq. Abr.* 398. pl. 5. S. C.
(b) 1 *Eq. Abr.* 295. pl. 4.
Proc. Ch. 317.
Eq. Rep. 76.
S. C.

And it is the same where money is directed to be paid out of land, as in the case of the Earl of *Derby* and the Earl *Rivers*, 2 *Vern.* 72. cited by Mr. *Ord.* By a marriage settlement lands are limited to husband for life, to wife for life, then to the first and other sons, &c. provided if there is no issue male, and one or more daughters, that trustees should stand seised, to the intent that the daughter should receive out of the profits 10,000*l.* and 100*l.* for maintenance, without limiting any time of payment; the daughter at seventeen disposes of it by will; and it was holden to be a vested interest in the daughter, and well disposed. *Trin.* 1688.

But in the case of *Bruen and Bruen*, in 2 *Vern.* 439. by a marriage settlement a term is created to raise 3000*l.* for daughters' portions twelve months after the death of the husband and wife; the daughter dies at the age of five years, the portion shall not be raised; for the reason given in *Vernon* is, that being to be raised out of land, she could not have occasion for it; but the better reason is, that she dying within twelve months, the time wherein it was to be raised, it was not vested. *Pasch.* 1702. 1 *Eq. Abr.* 267.

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The distinction therefore was well taken, whether the 50 *l.* was vested, or not vested in *Margaret*.

(2) Lord *Cowper* declares in the case of *Smell v. Dee*, 2 *Salk.* 415. that "the diversity is where the bequest is to take effect at a future time, and where the payment is to be made at a future time."—In the first case, if the legatee dies before the time, it is a lapsed legacy; in the latter instance, it is a vested interest, and descends to his personal representatives.

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And we think it was vested:

For first, The remainder vested immediately by the death of the testator; for *Foy* might sell or devise it, and consequently the 50*l.* is vested in those to whom it was payable; for if he had sold it, it must have been subject to the charge laid upon it by the testator.

Secondly, The estate and the charge upon it pass together, and the devisee must take it *cum onere*; for as it was the testator's intent that *Foy* should have the estate, it was as much his intent that he should pay the money out of it when he had it.

Supra p. 717.

It was said to be a condition (*paying* making a condition in the will) but that strongly shews the testator's intent was, that *Foy* should not have it unless he paid that money.

The cases cited fall under the distinctions before mentioned.

The case of *Carter and Bletsoe*, 2 *Vern.* 617. was, a devise to his son and his heirs, but his will was, that his son should pay 200*l.* to his daughter at her age of twenty-one; she died before, and consequently the legacy was not payable, by both rules laid down; it was not given till her age of twenty-one, and a portion payable out of land shall not be raised, if the party to whom it is payable die before the time limited for the payment of it.

In the case of *Van and Clark*, the devise was to trustees to put out at interest till the granddaughter of her sister attained the age of eighteen, or married, and then to pay it to her; so that nothing could vest in the granddaughter till that contingency happened, and she dying before, the portion could not possibly vest.

In the case of *Prouse and Abington* likewise the trust was to pay at the age of twenty-one, or marriage, and consequently the legatee dying before that age, or marriage, the trustees were not required to pay the money.

The

The case of *Hall* and *Terry* went upon the same reason; the trustees were not required to pay till twelve months after the estate came to them, which was after the mother's death, and consequently the legatee dying before, the trustees could not pay; and the expression, that the devise and time of payment commenced together, imports that the devise had no effect, and could not vest an interest till the time of payment came, upon which the trustee was to pay.

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There was a case of the like nature *inter Gordon* and *Rains*, 5 Geo. 2. 2 Kely. (a) 41. where a term of years was vested in trustees, on trust that if there was no son of the marriage, and there be one or more daughters, who shall attain the age of sixteen, the trustees, after the death of *H. Rains* and his wife, shall raise 6000*l.* to be paid at the age of sixteen, in case *H. Rains* and his wife be then dead; there was a daughter who lived to the age of twenty-two, but died in the life of her father and mother *H. Rains* and his wife. It was holden by Lord Chancellor *King*, assisted by Lord *Raymond* and *Jekyl*, Master of the Rolls, that the husband and administrator of this daughter was not intitled to the 6000*l.* which was not payable but upon a contingency which never happened; for all the cases, when the portion or money to be paid were looked upon to be vested, are where the money was not payable upon a contingency, or the contingency had happened.

(a) 3 P. Wms.
134 S. C.

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But in the present case, neither the remainder was limited upon a contingency, nor the legacy of 50*l.* was payable to *Margaret* upon any contingency; but the remainder vested immediately upon the death of the testator, and consequently the 50*l.* was payable out of the profits of that estate as soon as it came in possession.

Cafe 280. Brotherow, Widow of J. Brotherow, *vers.*
Hood. In Scacc'.

In case an husband dies before a legacy becomes payable to his wife, it is in the nature of a *Chose in Action*, which will survive to the wife.

2 Eq. Abr. 144. pl. 17. S. C. Com. Dig. Tit. *Baron and Feme.* (F. 1.)

THIS was a bill for a legacy of 60*l.* devised to the plaintiff by the will of *Jos. Mills* in 1715. when she should attain the age of twenty-one; she attained that age on the 14th of *February* 1734. but before that time had married one *Brotherow*, who was dead, and the bill was against the defendant as executor of the testator, who denied assets. But it was objected, that the executor or administrator of the husband ought to have been a party, for the right vested in the husband, who might release it.

Farr. 171.

Sed non allocatur; for the husband dying before the legacy was payable, it was in the nature of a *Chose in Action*, which would survive to the wife; and although the husband might possibly have released it, yet that shall not be presumed; and if it had been so, the defendant, to whom the release must be given, might make it appear. (1)

(1) If the husband in this case had had a decree for the legacy, and had died before he received it, it would have gone to the wife. This was de-

termined in the case of *Nanney v. Martin*, 1 Ch. Caf. 27. 2 Ch. Rep. 234.

Henry Harvy and Catherine his Wife, Daughter of Sir Thomas Aston, and Anne Clifton Widow, another Daughter, *vers.* Dame Catherine his Relict, and Sir Thomas Aston his Son and Heir, Henry Wright and Andrew Kenrick. In Canc'. Case 281.

ON an appeal from a decree of his Honour the Master of the Rolls, the case was this:

A condition precedent, *viz.* Marriage with the consent of

the mother or others, annexed to a portion or legacy, is not to be dispensed within a Court of Equity, though in the case of daughters' fortunes. 1 Atk. 361. Forr. 212. 2 Eq. Abr. 147. pl. 6. 216. pl. 12. 432. pl. 15. 503. pl. 41. 539. in N. 650. pl. 33. S. C.

Sir Thomas Aston having issue a son and three daughters, by an indenture of lease and release dated the 27th and 28th of May 1712. makes a voluntary settlement to the use of himself for life, then as to part to his wife for life, then to his son for life, and afterwards to his first and other sons in tail male; then to the use of Sir Robert Burdet and Serjeant Chesbire for 1000 years; which term is afterwards made to commence immediately on the decease of Sir Thomas Aston, and was, *inter al'*.

On trust, that if Sir Thomas should have one or more sons living at his death, and also more than one daughter then living, or born after, or married in his life with his consent, the trustees should raise for the portion of every such daughter 2000*l.* and should pay to her such sum at the time of her marriage with such consent as aforesaid, (that is to say) with the consent of her mother, if living and not remarried; if dead, or married to a second husband, with the consent of the trustees Sir Robert Burdet and Serjeant Chesbire, or the survivor of them, his executors, administrators or assigns;

And also on trust to raise for the maintenance of such daughters yearly the sum of 50*l.* till their age of eighteen, and

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and afterwards 70*l.* *per annum* till their marriage with such consent during the life of the mother, but if she died or married again, 100*l.* *per annum* till their marriage or death.

Provided, that if the said portions and maintenances should be raised or secured by those in remainder, or if there should be no daughters or younger sons, or if all the daughters die before marriage, and the younger sons before the age of twenty-four, and the expences of the trustees should be satisfied, the term should cease.

By will dated the 26th of *February* 1722. Sir *Thomas Aston* taking notice of the said term and trusts, and the purchase of other lands, devises those estates to the defendant *H. Wright* and *Andrew Kenrick* for 500 years, on trust by mortgage or sale to raise the sums of 3100*l.* and 1000*l.* (monies which he had applied out of his personal estate towards such purchase) and pay them to his executors, which should be accounted as part of his personal estate; then wills, that out of the monies to be raised by such mortgage, and out of the monies due to him on mortgages, bonds, notes or other securities, or in hands of goldsmiths, bailiffs, agents, or due for rent, there should be paid to each of his daughters unmarried and unprovided for at his decease, 2000*l.* as an augmentation of their fortunes provided for them by the said indentures, to be paid at such times, and subject to such conditions, provisoes, limitations and agreements, as their original portions are in the said indenture made subject and liable to.

By codicil he directs the term of 1000 years limited to Sir *Robert Burdet* and Serjeant *Chefbyre*, to commence immediately on his own decease, and adds other estates to the said term for the better raising of his daughters' portions, as therein appointed to be raised and paid; and limits his estate in *Chefbire* to Serjeant *Chefbyre*, till his sons attained the age of twenty-five years, on trust to raise provisions for his sons, and to apply the residue of the profits towards the raising of his daughters' portions by the said indenture, as they

they are by the said indenture appointed to be raised and paid.

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On the 16th of *January* in 1724. Sir *Thomas Aston* died leaving a son and three daughters; in *Pasch.* 1725. the daughters exhibit a bill, praying that the will might be proved, the trusts executed, and directions given for the execution of the trusts.

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On the 6th of *December* 1725. the Master of the Rolls decreed that the settlement, will and codicil were duly proved; that the trusts ought to be performed; that the trustees should raise the maintenance, and when portions became due should apply for further directions.

The plaintiff married *Catherine*, and *Clifton* married *Anne*, now his widow, both without the mother's consent, and in *Trinity Term* 1734. exhibit a bill of revivor for the payment of the portions, which by an order of the 7th of *November* 1734. stood revived.

And Dame *Catherine Aston* in her answer to it insists, that Mr. *Harvey* and his wife were acquainted before the marriage with the terms on which the provision for daughters was made, and that if they married without consent they could not have his wife's portion.

That the marriage was against her consent, and she refused consent, because *Harvey* had no estate real or personal, to make a suitable settlement for his wife or children, nor was any proposed, so that she could not in justice or conscience consent.

On the 5th of *November* 1736. it was decreed, that the plaintiffs were intitled to their original portions as well as to the additional portions given by the will, and to interest for the same from the time of their marriage.

FEET. 285.

On this case, the portions provided by the settlement and by the will have properly been considered distinctly, and I shall likewise consider them distinctly.

The

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The first question is, Whether, when a father by a voluntary settlement of his real estate vests a term of years in trustees, on trust to raise 2000*l.* a-piece for his daughters' portions, to be paid at the time of their marriage with their mother's consent, and a yearly maintenance till their marriage with such consent, it is proper for a Court of Equity to compel the trustees to pay such portion on the daughters' marriage, though her marriage was without the consent required?

Secondly, Whether, if the portion by the settlement ought not to be paid, there will not be a difference in respect to the augmentation of the portion given by the will?

In the consideration of these questions it may not be amiss to lay out of the case what seems uncontroverted on all sides.

Where a portion is given in consideration that a daughter should never marry, the condition is void. *Swinh.* 6th edit. 282.

(a) 1 Mod. 86.

300.

1 Vent. 199.

Raym. 236. 2 Lev. 21. 2 Keb. 756. 787. 814. 867. 3 Keb. 19. 2 Ch. Rep. 26. 1 Eq. Abr. 111. pl. 4. 1 Ch. Cal. 138. S. C.

And first, That if a portion be given on consideration that the daughter should never marry, I think that such a condition should be rejected as repugnant to the original institution of the creation of mankind; in the case of *Fry and Porter*, (a) Ch. Baron *Hale* takes notice that the condition did not restrain marriage, though it required consent.

Where a legacy is given on consideration that the legatee should not marry without consent and there is no devise over, the condition is void.

Secondly, If a pecuniary legacy be given on consideration that the legatee shall not marry without consent, and no devise over; the condition would be holden ineffectual in this Court.

4 Burr. 2055. *Infra* p. 739.

(b) 2 Freem.

171.

1 Eq. Abr. 120.

pl. 1. S. C.

So it was holden in the case of *Sir H. Bellasis* (b) *vers.* *Sir W. Ermine*, 1 Ch. Ca. 22.

(c) 1 Eq. Abr.

120. pl. 3. S. C.

Infra p. 739.

So in the case of *Fleming and Waldegrave*, 1 Ch. Ca. (c) 58.

So in the case of *Jervois and Duke*, 1 Vern. 19.

So in the case of *Garret and Pritty*, 2 Vern. 293. and in many other cases; so that it seems a point established in this Court. HARVEY v. ASTON and Others.

And the true reason of those cases seems to be what is intimated by Ch. Baron *Hale* in the case of *Fry and Porter*, 1 Mod. 308. namely to keep an uniformity between this Court and the Ecclesiastical Court; for since pecuniary legacies may be sued for in the Ecclesiastical Court where such a condition would be holden void, it would be strange that the legatee suing in the Ecclesiastical Court should recover his legacy, but suing here he should be barred.

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And it is probable that the like determination might be made in this Court, to keep up an uniformity in its own decrees, if a legacy should be given out of land in the same manner, though the Ecclesiastical Court could have no cognizance in that case; for it might appear incongruous that the same words should have a different construction in respect to a legacy out of lands, from what they would have in case of a money legacy, when there is no essential difference in the equity or reason of the thing.

1 P. Wms. 667, 668. in N.

But on the contrary it is as fully established in this Court, that where a pecuniary legacy is given to a single woman, on condition that she do not marry without consent, and if she do so, that then the money shall go to another person, if she marry without the consent required, she shall lose her legacy. (1)

Infra p. 755.

This difference was agreed in the case of *Sir H. Bellasis* and *Sir W. Ermine*.

In the case of *Wiseman and Forster*, 2 Cha. Rep. 23.

(1) And the following reason for this difference is given by Lord *Hardwicke* in the case of *Wheeler v. Bingham*. "The true ground upon which this Court has suffered the condition to *effluate*, is not the intention, (name-

ly of the testator) but the right of a *third person*, the being given over, "and vesting in that person, if the condition is not performed." 3 Atk. 367.

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In the case of *Sutton and Jewke*, 2 *Cha. Rep.* 95.; in the case of *Jervois and Duke*, 1 *Vern.* 19.

In the case of *Stratton and Grymes*, 2 *Vern.* 357. and many other cases, which it is needless to enumerate, since it is agreed, and there is no case to the contrary.

The Ecclesiastical Court makes no difference whether there is a devise over or not but in both cases holds the condition void.

[731]

But the Ecclesiastical Court makes no difference where there is a devise over, and where not; yet Courts of Equity have always made a difference; which shews, that where the intent of the party is clear and express, that the legatee shall not have the legacy unless she marry with consent, the Court of Equity hath not followed the rule of the Ecclesiastical Court.

And as this Court allows the condition of not marrying without consent, where the intention of the donor or deviser is apparent that it should be complied with, by devising it over if it was not; so it is more strongly allowed where the settlement is of lands on such condition; as appears by the case of *Fry and Porter*.

And much more so where such condition is made a condition precedent; as was determined in the case of *Bertie* and Lord *Falkland*. (a)

(a) 1 Salk. 231.

2 Freem. 220.

Holt 230.

2 Vern. 333. 3 Ch. Caf. 129. 12 Mod. 182. 1 Eq. Abr. 110. pl. 10. S. C.

These things being premised, and I think agreed on all hands, I shall consider how far the present case agrees or disagrees with the rules and grounds upon which the determinations in the points mentioned have been made.

Now in the present case it seems plain, that the marriage with consent is made a condition precedent to the payment of the portions provided by Sir *Thomas Aston* for his daughters by the settlement of 1712., for the 2000*l.* is to be paid to each daughter at the time of her marriage with such consent as aforesaid, so that such marriage must necessarily precede the payment of the money.

It is admitted by the counsel for the plaintiffs, that the marriage must precede, and that is the principal thing regarded, and the consent is only a circumstance which may well be dispensed with.

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But upon consideration of the whole settlement, it seems evident to me, that the marriage with consent, was the principal thing in view of Sir *Thomas Aston* for it is repeated in every branch of the trust, if there was no son, and two daughters, the portion of the youngest was to be paid on her marriage with consent; so if more than two daughters; so if sons and two or more daughters; so that the consent required was as much designed by Sir *Thomas Aston* as their marriage, to intitle the daughters to their portions.

[732]

It is a known rule, that where a condition precedent copulative precedes an estate or trust, the whole must be performed before the estate or trust can arise; the case of Sir *Caspar Wood* alias *Creamer* vers. *Duke of Southampton*, *Show. Ca. P.* 83. is an authority express in this point; Sir *H. Wood*, on the marriage of his daughter with the Duke, made a settlement on trust to raise a maintenance for his daughter till her marriage or till her age of seventeen; and if his daughter after her age of sixteen should marry and have issue male by the Duke, then for a settlement on the issue male, and for a better provision for the Duke and his wife, on trust for the Duke and his wife for their lives, and after to their first and other sons in tail male. She married before the age of sixteen, and after that age died without issue; the question was, Whether the Duke should not have the estate for his life? And at first it was decreed for him, but that decree was reversed in the House of Lords; for it was said that the words were plain and certain, that there must not only be a marriage, but issue male; and when a condition copulative, consisting of several branches is made precedent to any use or trust, the intire condition must be performed, else the use or trust can never arise, or take place; and it would be violence to break the condition into

Supra p. 516.
Infra p. 744-

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two parts, which is but one according to the plain and natural sense of it.

(a) 2 Vern.
371.
8 Mod. 222.

The same determination was made afterwards in this Court in the case between Sir *Cesar Wood* (a) and *W. Webb*, *Show. Pa. Ca.* 87. and affirmed in the House of Lords.

So that, according to the plain rules of construction, the marriage with consent, which is one intire condition, must be complied with in the whole, before the portion of the daughter can be payable, if the intent of Sir *Thomas Aston* can take place.

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This is, still more evident, if possible, in that Sir *Thomas Aston* hath directed a maintenance for his daughters till such marriage with consent; now it could never be Sir *Thomas Aston's* meaning, that the maintenance should continue after the portions were paid; but if the portions be payable on marriage, though without consent, and the maintenance be paid till marriage with consent, they must have the maintenance and the interest of the portion at the same time; this plainly shews that Sir *Thomas* intended that the portions should not be paid till the maintenance ceased, that is, till marriage with the consent required.

It was observed very truly, that in the proviso which determines the trust, the words were, *If no daughter, or all die before marriage, &c.* the term should cease; but that must be intended of such marriage as before mentioned, the marriage with the consent of the mother or trustees.

It was likewise observed, that the trust is, if Sir *Thomas* should have two daughters living at his death, or who should marry in his life-time with his consent, the trustees should raise 2000*l.* for the portion of every such daughter; whence it was inferred, that if the portions were to be paid only on marriage with the consent of the mother or trustees, such daughter as married in Sir *Thomas Aston's* life with his consent, could have no portion; but I see no ground for such an inference, for since 2000*l.* was to be raised

raised for the portion of every such daughter who was living at his death, or married in his life with his consent, and consequently the time of payment on marriage with the consent of the mother and trustees, must extend only to such daughter as married not with the father's consent in his life.

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I am therefore of opinion, that marriage with the consent of the mother or trustees, is a condition precedent, which must be performed before the daughter can be perfectly intitled to the 2000*l.* to be raised by the trust of this settlement;

And that it was the plain and manifest intention of Sir *Thomas Aston* that his daughters should not have the portions, to be raised by this trust, paid at their marriage, unless they married with such consent as he prescribes to them.

But the principal objection is, that if the intention of Sir *Thomas Aston* was such, yet that intention is not agreeable to the rules of this Court; for by the civil law a condition not to marry without the consent of others, is unlawful and void; and that rule of the civil law is adopted into the determinations of this Court in like cases; and the civil law makes no distinction between conditions precedent and subsequent, but looks on both as equally unlawful.

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4 Burr. 2059.

The knowledge of the civil law is in many respects useful, but in regard to the determinations of this or other Courts in *Westminster-Hall*, *Selden* seems to make a proper observation, *Differt. ad Flet. cap. 3. sec. 5. (2)* who after

1 Hale's P. C.
p. 16.
2 Inst. 98.
3 Inst. 100.
1 P. Wms. 166.
1 Bl. Com. 799

(2) The following are the words of *Selden* upon this subject. "Non quidem omnino quati regnum hoc seu rempublicam Anglicanam Cæsaribus jurive Cæsareo subjici aut regimen heic inde pendere omnino, aut jus Anglicanum ante sive scripto sive moribus constitutum inde mutationem recipere voluissent (nam passim etiam jus hoc, qua multifariam a Cæsareo discrepat eique plane adversatur, ut sequendum docent ipsi) Sed ut

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after notice taken of the prevalency of the civil law in this realm in several periods of time, concludes that it is manifest some sort of use of it prevailed in decisions which were to be determined by the law of *England*; not that any thought the realm subject to the imperial law, or that the common law could receive any change from it, for all taught that the common law was to be followed, where it varied from it, or was repugnant to it; but if there was no express rule of the common law in the case, the rule of the civil law was followed; or if both laws agreed, the matter was in some measure confirmed or explained by the words in the civil law.

It is plain from what has been before observed, in regard to the condition of not marrying without consent, when annexed to a legacy pecuniary without any devise over, the rule of the civil law is followed; if there be a devise over, the rule of the civil law is rejected.

The present case being different from both these extremes, in order to discern how far the reason of the civil law is applicable to it, it may be proper to consider shortly the ground upon which this rule in the civil law was founded.

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Now as by the statute of wills (3) 32 *H. 5.* a man was allowed to devise his lands, so as he left a third part of his lands holden by knight-service to descend to his heir;

So by the *Lex Falcidia* *Quicumque civis Romanus post hanc legem rogatum testamentum faciet, is quantum cuique civi Romano pecuniam jure publico dare, legare volet, jus potestisque esto: dum ita detur legatum, ne minus, quam partem quartam hereditatis, eo testamento heredes capiant.* *Dig. Lib. 35. tit. 2.*

tum ubi deesset nostri juris præscriptum expressius, ad rationem juris etiam Cæsarei ratione suffultam recurreretur, tum ubi jus utrumque consonum, etiam Cæsarei quasi fir-

“maretur explicareturve res verbis.” *Diff. rt. ad Fl. tam.* cap. 3. sec. 5.

(3) The statute referred to in the text is the stat. 32 Hen. 8. c. 1. which is explained by the stat. 34 Hen. 8. c. 5.

And if less was left, it was to be made up a fourth part, *Dig. Lib. 35. tit. 2. lex. 73.* Hence it was said that he could devise only *usque ad quadrantem*, for as he who had the whole inheritance, was called *heres, ex affe*, as that was divided into twelve parts, the legataries could have but nine parts, and the other three remained to the heir; and if the heir was totally disinherited without just cause, the will was set aside; as *testamentum inofficiosum. Inst. l. 2. tit. 18.*

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Heineccii Pand.
Lib. 35. tit. 2.
sect. 208.

Heineccii Inst.
Lib. 2. tit. 18.

This fourth part of the heir was called *Legitima Portio*.

This *Legitima Portio* being payable on marriage, when they went into another family, was endeavoured to be avoided two ways.

First, By giving it on condition that they should not marry.

Secondly, By preventing their marriage.

Both were endeavoured to be remedied by the *Lex Julia*; which provided, as Dr. Strahan rightly observed, *Qui celibatus aut viduitatis conditionem heredi legatariove injunxerit, heres legatariusve ea conditione liberi sunt, neque minus delatam hereditatem legitimam hac lege consequantur.* Goth' de fontibus juris civilis.

1 Atk. 365.

Against the hindrance of the child's marriage, it was provided, *Qui liberos, quos in potestate habent, injurie prohibuerint ducere uxores aut nubere; vel qui dotem dare non volunt, per proconsules, praesidesque provinciarum cogentur in matrimonium collocare & dotare. Dig. l. 23. tit. 2. lex 19.*

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The branch of the *Lex Julia*, which made void conditions prohibitory of marriage annexed to a legacy, mentions only such as prohibited marriage totally, and extended to prohibitions to widows as well as maidens; but in respect to widows it was soon after dispensed with; and therefore if a man gave a legacy to his wife on condition, that, if she married, it should go to another, *Non dubium est quin, si nupserit, cogenda est restitutio*, saith Gains. *Dig. l. 32. tit. 3. l. 14.*

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And though such a condition is mentioned as void, *Si mulieri legatur. Dig. l. 35. tit. 1. l. 22.*

Yet *Gothofred* in his notes in the margin asks *quid si uxori?* And answers *si nupserit, cogenda erit restituere.*

And in the *Novella, lib. 22. cap. 44.* it is said that the law was abrogated in respect of legacies to a wife; for she must choose to forbear marriage, if she would have the legacy, or to lose the legacy, if she would marry. (4)

So in the *Orphan's Legacy 3. pt. c. 17. sec. 9.* it is said, that such a condition annexed to a legacy given to a virgin is void; but the civil or rather the canon law, allows it in a legacy to a widow, especially if given by the husband to his wife, or by a son to his mother.

Another evasion of this law, was by annexing a condition not wholly prohibiting marriage, but requiring to marry *ad arbitrium* or with the consent of another, whose consent the testator knew would not be given.

But this being a mere evasion, was looked upon as equally unlawful, *Rescindi debet, quod fraudenda legis gratiâ adscriptum est. Dig. l. 35. tit. 1. l. 64.*

[737] But this was void only *ubi fraus legi fracta est.* And therefore a condition not to marry a particular person was lawful; *si legatum sit, si neque Titio, neque Seio, neque Mavio nupserit, si plures denique personæ comprehensæ fuerint, si cuilibet eorum nupserit, amitteret legatum,* for total restraint appears not, since she may marry any other. *Dig. l. 35. tit. 1. l. 63.*

(4) The following are the words alluded to by our author. "Unde sancimus: Si quis prohibuerit uxorem ad aliud venire matrimonium, siue etiam uxor maritum; (idem namque est utrinque) et pro hoc aliquid reliquerit: unam ex duabus

"conditionem habere contrahentium alterum; aut ad nuptias venire, et abrenuntiare præceptioni, (a) aut si hoc noluerit, sed honorat defunctum, omnino abstinere de cætero nuptiis." *Novell. Lib. 22. cap. 44.*

(a) *Et Legato. Gothofred.*

So

So if the condition be not to marry a merchant widow, any in *York, &c. Swinb. 6th edit. 4th part, sect. 12. p. 284.*

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But suppose a legacy be given upon a precedent fact, which may or may not be done, or to be paid at such a time which may not come; if the fact required be not performed, or the time required never come, by the Civil Law the legacy is lost, and can never vest.

Dig. l. 36. tit. 2. l. 21, 22. If a legacy be given cum pu- bes erit, cum in familiam nupserit, cum magistratum inierit, &c. nisi tempus conditione obtigit, neque res pertinere, neque dies legati cedere potest.

Infra, p. 754.

So *Ulpian* saith, *Dig. l. 35. tit. 1. l. 41. Legata sub conditione relicta non statim, sed cum conditio extiterit, deberi incipiant, ideoque interim delegari non potuerunt.*

And although where the condition is certain, if the legatee die, though the condition be afterwards performed, when performed the heir shall have it; yet when a legacy is given upon a time or fact precedent, which may never happen, if the legatary die before, it shall vest in the heirs.

So *Orph. Leg. part 3. c. 17. f. 11. If a legacy be given at marriage, or at the age of 21, till the time comes, or the marriage takes place, the legacy shall not vest.*

A difference is there made, and by *Swinburne*, (a) and followed by many cases in law and equity, *Dyer, 59. b. in margine. 2 Vent. 342. 2 Vern. 137. 508. 673.* where the time is annexed to the legacy, and where to the performance of the thing given, as at 21, or to be paid at 21.

(a) *Swinb. 6th edit. 615. Supra, p. 722. Infra, p. 752.*

But in the case of *Yates and Fettiplace, 2 Vern. 417.* a legacy to be paid at 21, or at 21 is laid down by the Lord Keeper to be all one; who said that the cases cited by *Swinburne* and *Godolphin* did not warrant the difference.

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Supra, p. 737.

§. Atk. 332.

But be that as it will, it is plain that by the Civil Law a legacy given on a precedent contingency is not payable till the contingency happen.

Hence it appears, that what is said, that the Civil Law makes no distinction between a condition precedent and subsequent, must be taken with allowance.

The ground of saying so seems to me to be this: All conditions impossible, *legibus interdicta* or *probrosa*, by the Civil Law, are void, and the legacy is absolute and without condition; and consequently it is not material whether it be precedent or subsequent, since it is null and void. And it would be strange, when the law makes a condition void, and saith that the legatory shall be discharged from the condition generally, to say that it shall be so only where the condition is subsequent, not where it is precedent.

Besides, every condition by the Civil Law suspends the legacy; so that though it be subsequent, it is not as gifts at Common Law, actually due to the party, but, as was said before, *cum conditio extiterit deberi incipiant, & interim delegari non possunt*.

Supra, p. 737.

So that the meaning is, a condition subsequent by the Civil Law is of the nature of a condition precedent at Common Law; the interest does not vest actually, though virtually it does, till the performance of the condition, or in negative conditions till caution or security is given for the performance. *Swinb. 4 part, f. 9.*

But I do not observe, that in the case cited by the learned Civilians, where the legacy is given on a precedent fact to be performed, that may be performed, or not, that the Civil Law allows the legacy to take effect till the fact done; and in the instances before given the Civil Law saith, the legacy till performance shall not have effect,

But it hath been insisted, that in many cases the Court hath looked upon these conditions as void, and rejected them, and that, in instances as strong as the present case.

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That this Court hath decreed the legacy where such condition was subsequent, and no devise over, was before observed; and that it hath as constantly refused to decree it, where there was a devise over, is as evident.

Supra, p. 729.

The case *Mo. 857. Gressly and Luther*, was insisted on for that purpose; which was an action of *Assumpsit* on a promise made by the defendant, in consideration that the plaintiff, who was the mother, would give her consent and furtherance to her daughter's marriage with him. *Winch* held it no good consideration, because, he said, in *Pigor's* case it was determined, that a person to whom a legacy was given on condition that she married with the consent of her mother, had a sentence for her legacy, though it was pleaded in bar that she did not marry with the consent of her mother.

Infra, p. 750.

This *Pigor's* case is plainly a sentence in the Ecclesiastical Court, where such condition is always disallowed; but in the principal case, the consideration was holden good by the three other Judges; for nature, they said, had given parents the power of disposing of their children, and in nature the children are bound to obey them, as appears by the report of the same case. *Hob. 10. 1 Brownl. 18.*

But three cases have principally been relied on, determined in this Court, as parallel to this.

First, The case of *Fleming and Waldgrave*, 1 *Cha. Ca. 58.* which was a lease for years to Sir *Edward Waldgrave* and his lady, on trust to raise 900*l.* for a feme sole, in case she did not marry contrary to the good liking of Sir *Edward* and his Lady; if she did, then to go to such persons as Sir *Edward* and his lady, or the survivor should nominate, and for want of nomination, to Sir *Edward* and his Lady, or to the survivor of them; she marries without their consent; they die without

Supra, p. 729.

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any nomination. A bill was preferred by *Sandall*, who had a general deed of gift from Lady *Waldgrave*, who survived, of all her goods and chattels, against *Francis Copledike*, who had taken out administration to the same and Lady *Waldgrave* to have the benefit of this lease; which was decreed for *Copledike*.

The case is obscurely reported, but here was no nomination, for the gift of all her goods and chattels could not amount to make *Sandall* nominee of this *year*.

Here appears no dislike of the marriage; for though there was no consent, it does not appear that they disliked it, and the making of no nomination is an argument that they did not, and so the condition is not broken; and this might be the reason, the book saith, it was not in the power of the trustees to dispose of the lease otherwise; though the book gives no reason for such saying; but in the case of *Creagh* (a) and *Wilson*, 2 *Vern.* 573. it is said, that there may be a difference between marrying without consent, and marrying against consent, according to the case of *Fleming* and *Waldgrave*.

(a) 1 Eq. Abr.
III. pl. 5. S. C.
Infra, p. 746.

(b) 2 Eq. Abr.
III. pl. 6. S. C.

Secondly, The case of *Needham* and (b) Sir *H. Vernon*, resolved *temp.* Lord *Nettingham*, *Finch*, C. R. 62.

The case as reported is, That the daughters of Lord *Kalmurry* and the son of Lord *K.* prefer a bill to have the benefit of a settlement made by Lord *K.* and his son, whereby trustees were to raise 1500*l.* a-piece for the portions of his daughters, the plaintiffs, and of two other of their sisters, payable at their marriage, with the consent of the trustees or of the major part of them, and for their maintenance in the mean time; and if the trustees had raised the portions before they married, they were to improve them to the best advantage, that they might receive the increase for maintenance till their marriage; and if they married without consent, the portion of her so marrying should remain over to another; the trustees received the rents ever since the death of Lord *K.* had raised the portions; and the plaintiffs being in years, and intending

not

not to marry, would lay out their portions in the purchase of annuities for their larger maintenance.

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The question was, Whether the plaintiffs ought to have the portions at their own disposal, before they married with consent?

And it being admitted, if either died before marriage, that her portion should go to her executor or administrator, and they offering security to indemnify the trustees from any claim by the defendants, who were infants, and children of *Charles Lord Kilmurry*, to whom the portion after such marriage without consent was limited by the settlement; the Court decreed it on giving such security.

It is evident that this decree was not conformable to the usual course of proceedings in Equity; if one may guess upon so short and obscure a report of the case, it seems to be a decree by consent.

The brother *Robert*, who probably was the eldest son of *Lord Kilmurry*, and party to the settlement and to the bill, and to whom the benefit of the portions, if not paid, would result, consents that his two sisters should have their portions to lay out in the purchase of annuities, for their better support, and so admits that they would go to the executor or administrator if they died unmarried; or perhaps it might be apprehended by the parties, that a sum of money given to a daughter to be paid at her marriage, like a sum devised to an infant to be paid at his age of 21 years, was an interest vested which would go to the executor or administrator, though the devisee died before the time of payment, and upon such admission the portions were decreed.

But there was still a difficulty for the defendants to whom the money was limited over, in case the daughters married without the consent of the trustees; but the plaintiffs being in years, and declaring that they intended never to marry, and being less likely to do so, when their fortunes were turned into annuities,

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annuities, and offering any security to indemnify the trustees against the infants' claim, on such security which the trustees were willing to accept, the Court decreed the portions to them.

However it is manifest, that this question, Whether the condition annexed to the payment of the portions, that the daughter should not marry without the consent of the trustees, was good or not, was not the thing under the consideration of the Court; for they decreed the portions though the daughters never married; whereas it is agreed on all sides in the present case, that marriage is necessary before the portions are payable, whether the mother's consent is necessary, or not.

But it is most evident that the Court looked upon the condition as good, or there had been no need of security to indemnify the trustees. What need of such security, if the condition was void?

If it be thought that it may be inferred from this case, that the portions were an interest vested in the daughters, though they died before the time of payment; it is to be considered, that this was only the admission of the parties; there was no determination of the Court in that matter.

Supra, p. 719.

But I apprehend that it is now a settled point in Courts of Equity, that if lands be settled, or a term of years created, on trust to raise portions for daughters, to be paid at the age of 21, or at the time of marriage, and the daughter dies before the time of payment, the portion shall not go to the executor or administrator of the daughter, but sink in the estate for the benefit of the heir.

So it was holden in the case of *Pawlet and Pawlet*, which was affirmed in the House of Lords, 1 *Vern.* 204, 321. 2 *Vent.* 366. S. C.

So in the case of *Yates and Fettiplace*, 2 *Vern.* 416. *Pre. Ch.* 140. S. C.

So

So in the case of *Bruen and Bruen*, 2 Vern. 439. *Pre. Cha.* 195. S. C.

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So in the case of *Tournay and Tournay*, *Pre. Cha.* 290. though the portion was to be paid within a year after the father's death, with interest from his death, if the child died within the year.

Thirdly, The case *Semphill (a) & Un. vers. Bailly & Un. Pre. Cha.* 562.

(a) 2 Eq. Abr.
213. pl. 6. S. C.

Gaskil had three daughters, *Sarah, Elizabeth, and Rebecca*; the plaintiff proposed to marry *Sarah* the eldest; *Gaskil* declared if she married him, he would not give her a groat, on which the match broke off; afterwards by will he devised his real and personal estate to his executors, to raise 35 *l. per annum* for his daughter's maintenance, and if she married with the consent of his executors, 1000 *l.* in part of her portion; then settles the real estate to her use for life, and then to the first and other sons in tail; 1000 *l.* to the second, and 1000 *l.* to the third; she afterwards married the plaintiff without the consent of the executors. It was decreed *per Lord Lechmere and Ch. J. King* in the Dutchy Court (*Dormer cont.*)

First, That this is a pecuniary legacy, and no devise over, for the real estate is afterwards devised.

Secondly, It was to be paid at the age of 21, or at her marriage, which seems to supersede what was before-mentioned, for the words are positive that it should then be paid, but there are no negative words that it should not, if such marriage was without the executors' consent.

Thirdly, What the Court principally relied on was, That the expression of marriage with the consent of the executors, was previous, yet it was but a loose inconsiderate way of expressing himself; words which are construed to be a condition, must be such as plainly shew that it was the intent of the testator that the estate or gift should be conditional; what the testator meant is difficult to say; it is supposed that he meant that she should not marry the plaintiff, but he does not say

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say so ; if he meant that she should never marry without the executors' consent, he would not have given it at her age of 21, yet the words are general, and not confined to her marriage without consent under age.

Since then it is apparent, that the money to be raised is not payable till their marriage with the mother's consent, which is a condition precedent to the payment ; since even by the Civil Law, if money be given to be paid at a time or upon an act previous to the payment, nothing becomes due or can be demanded, till the time incurred or the act performed ; since no case appears in which a Court of Equity has ever decreed trustees to pay portions out of lands given on a condition precedent, that the party should first marry with the consent of the mother ; the matter must be considered as *res integra* ; and upon the best consideration of it I have been able to make, I am of opinion that Sir *Thomas Aston's* daughters are not intitled to their portions by this settlement, unless on their marriage with their mother's consent.

And the reasons on which I ground my opinion are :

First, That it is the right and liberty of the subject, who makes a voluntary disposition of his own property, to dispose of it in what manner and upon what terms and conditions he pleases ; this I believe will be universally allowed.

Supra, p. 516.
732.

Secondly, That it is a fixed and settled maxim of law, that if an estate in land, or interest out of land, is limited to commence upon a condition precedent, nothing can vest or take effect till the condition is performed.

And this is so strong and so settled a point, that it holds although the previous act was at first impossible, or afterwards becomes impossible by the act of God or any other accident, and the estate can never vest. This is *Co. Lit.* 206. 219. and is a rule so well known, that I need not cite cases to prove it.

And

And this being a fixed maxim of the Common Law, *Æquitas sequitur legem*; it is true that in Courts of Equity it has prevailed, and it is reasonable, that where a compensation can be made, equity will relieve; for since it is the clear intent of the party, that the estate should go to him, so when it was limited in case he performed such condition, if the performance be prevented by the act of God, or other accident, it is highly equitable, if an adequate recompence can be made to him for whose benefit the condition was designed, that relief should be given, whereby the whole intent of the party may take effect.

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This relief was heretofore given only on breach of conditions subsequent, the Court being cautious of extending it to conditions precedent.

But the reason being in both cases the same, the Court hath of late years given relief in case of conditions precedent as well as subsequent.

But where the matter lies not in compensation, as in conditions not to marry without consent, relief hath never been given that I have understood.

This was in the case of *Bertie & Ux.* vers. Lord Falkland, 2 Vern. 333. 3 Ch. Ca. 189. 1 Salk. 231. which was solemnly settled on great deliberation by Lord Sommers, Chancellor, assisted by Ch. J. Holt and Treby, all persons of great eminence and ability.

Mr. Cary by will in 1685 devised to trustees, on trust for Mrs. Willoughby his heir at law for her life; and if she married Lord Guildford in three years after his death, then to her first and other sons of that marriage in tail male; if she did not marry, then to Lord Falkland and his heirs.

A treaty of marriage was on foot, some backwardness seemed on Lord Guildford's side, so three years elapsed, and no marriage

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marriage took place; and she afterwards married Mr. *Bertie*, but could not be relieved.

And it was said in that case, that it would not be easy to find a precedent of relief in a Court of Equity, in case of a condition precedent.

So in the case of *Creagh & Un. vers. Wilson*, 2 Vern. 572. 1 Eq. Abr. 111. pl. 5. S. C.

A man devised 200*l.* to his granddaughter, if she continued with his executor till 21; but if taken away by her father (who was a papist) before that age, or if she married without the consent of her executor, then he gave her but 10*l.*

On a visit to her father with the executor's consent, he married her to a papist. It was decreed *per* Lord King that she should have but 10*l.* for he looked upon this as a condition precedent, and the decree of the Master of the Rolls *cont.* was reversed.

But it was objected, that in the case of *Bertie* and Lord Falkland, there was a devise over; but there does not appear any such in the case of *Creagh* and *Wilson*.

But what is the effect of a devise or limitation over?

Where a condition is annexed, not to marry without consent, it is a more full and plain indication of the testator's intention that the condition should be complied with, if it be limited over in case the consent be not, than if there is no such limitation over; because as it is said, there is as full evidence that the testator intended Lord Falkland should have the estate, if Mrs. W. did not marry Lord Guildford, as there was that her issue should have, if she did marry him. Now if the words of the settlement shew as plainly that Sir Thomas Aston meant his daughters should not have the 2000*l.* a-piece to be raised by the settlement, where is the difference if the money had been given away to another?

In the case of *Fry and Porter*, 1 Mod. 308. Ch. Baron Hale saith, it is urged there should be no relief, because there is a limitation over; but that I shall not go upon. There have been many reliefs in such cases, but I think none in this; both parties are in equal degree to the devisor; it is a voluntary settlement; since therefore the intent is as expresse that the person to whom it is limited should have it, if the condition is not performed, as the first should, if it be; I think that the construction should be made to comply with the intention of the party.

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Now in the present case the settlement expressly provides, That if any daughter die before she marry with such consent as aforesaid, the sum intended for her portion shall cease, and the estate be exonerated therefrom; or if raised, shall be paid to such person to whom the remainder or reversion shall belong.

This seems to me equally strong as if he had said, it shall be paid to J. S. especially if it be considered, that the money doth not yet belong to the daughter; where a legacy is given to another, defeazable upon marriage without consent, there it may be proper to take the money from her to whom it was first given, and vest it in another, in order to shew the fixed and determinate purpose of the testator; for if it be not limited over, the mention of marriage with the consent of trustees, executors, or any other, looks rather like advice, recommendation or request to do so, than any resolution that she should lose her legacy if she did not; but where it is upon a condition precedent, the interest is not vested, and consequently cannot be taken from any in whom it never attached, and transferred to another; for as the rule of the civil law expresses it, *Cum conditio extiterit, tunc deberi incipiunt, & interim delegari non possunt*. Therefore in such cases it seems more proper to say, the portion shall not be raised, or cease, which was indeed Sir Thomas Aston's intention, and not to give it from his heir to another; this is what a Court of Equity would direct in a like case, as appears by Lord Parvlet's and the other cases mentioned, and argues that Sir Thomas Aston meant the same thing; and

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and therefore the rule, *expressio eorum quæ tacite insunt, nihil operatur*, I think not applicable to the present case.

A third reason, which influences me to this opinion, is, that it is most agreeable to the rules of equity, to direct the execution of the trust according to the intent of him who placed the trust in him; it is said that a trust is construed favourably; and it is true, that it is construed with as much advantage as may be to make good and answer the intent and design of the party; but it is construed strictly with regard to the execution of the trust; and therefore it would be a strange thing, when the trust directs the trustees to pay the money at the time of the daughter's marriage with her mother's consent, that the Court should direct them to pay the money before that time.

Nothing could justify a court of conscience to decree trustees to act so contrary to the express words and design of him who intrusted them, unless it were that the condition of marrying with the consent of the mother or trustees, is, as it has been suggested, an insufferable restraint on young women, which encourages a vicious course of life, is a wanton exercise of power in a parent, to subject his children to the arbitrary controul of others in their marriage, not only of their mother, but of strangers, executors, administrators and assigns.

In case the condition was chargeable with such pernicious consequences, I should think it desirable that the Legislature should suppress it.

Fourthly, But it is an argument of no small weight in my opinion, that the restraint in the present case, is not only lawful, but prudent and reasonable, and no consequence more likely to ensue from it, than the hindrance of an inconsiderate or imprudent marriage.

By the *Roman* law, the marriage was null, if made without the father's consent, *nuptiæ consisteré non possunt, nisi consentiant*

fentiant omnes; id est, qui coeunt, quorumque in potestate sunt.
Dig. l. 23. tit. 2. l. 2.

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Hence *Grotius* observes that some went so far as to think that the father's consent was necessary by the law of nature, to the validity of the marriage, *Super facultate morali quaestio oritur de parentum consensu, quem ad validitatem conjugii quasi naturaliter quidam requirunt*; but that is going too far.

But *Grotius* points out the proper rule, *Sed in eo falluntur. Nam quae adferunt argumenta, nihil aliud probant quam officio filiorum conveniens esse, ut parentum consensum impetrent; quod plane concedimus cum temperamento, nisi manifeste iniqua sit parentum voluntas.* Gro. de jure B. & P. l. 2. cap. 5. sec. 10.

So *Puffendorff*; *Officium pietatis & reverentiae requirit, ut & consilium parentum adhibeant liberi, nec ipsorum voluntati relucantur.* L. 6. cap. 2. sec. 1.

By the custom of *London*, a daughter loses her orphanage share of her father's personal estate, if she marries without his consent, unless he be reconciled to it before his death. Resolved in the case of *Roden and Howlett*, (a) 1 Vern. 354.

(a) 1 Eq. Abou
156. pl. 12.
S. C.

And it is the constant declaration of Judges of the law, and in Courts of Equity, that marriage with the parents' consent, is a piece of obedience which children owe by nature to their parents.

Nor is this obsequiousness less due to the mother than the father, though the authority and power of the father is greater.

By the civil law the father might devolve the care of his daughter's marriage to the mother, *si in arbitrio matris pater esse voluerit, cui nuptum communis filia collocatetur.* Dig. l. 23. tit. 2. lex. 62.

And those who argue against the nullity of the marriage by the law of nature, if made without the father's consent,
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insist that the mother's consent should be equally necessary with the father's; for in nature they say, *Una omnibus parentibus servanda est reverentia*. Dig. 1. 23. tit. 2. not. ad lex. 14.

Supra p. 739.

It was on this argued, that the promise to the mother for her consent, and furtherance of the daughter's marriage, was holden a good consideration in the case. *Mo. 857. Gressly and Luther.*

And if the father may require his wife's care in the marriage of his daughter, why not a friend's, as here, if his wife died, or should marry again, whereby she might be less fit for such a trust?

Why may not a man confide, that his friend would take care to make no executor or assignee but such as he could rely on, in case his next of kin (who would be his administrator) was not so proper for the trust?

And as to the supposition, That such a trustee may act out of interest, or for by-ends, and so refuse consent without any ground, such proceeding would surely be a breach of trust, which I doubt not but this Court may find means to remedy, as well as in case of other breaches of trust.

But the condition in this case is the more reasonable, since here is a competent maintenance provided by this settlement for the daughters till their marriage with such consent as required; so that they are not left destitute of subsistence, although the 2000*l.* designed in lieu of that marriage, should not be received by them, they have 70*l. per annum*, and after the death or second marriage of their mother, 100*l. per annum* till married with consent, which is equivalent to the interest of that portion; which seems designed rather as an augmentation of their fortunes, to encourage them not to marry without the mother's consent.

So that what is required, that they should marry with their mother's consent, is not only a lawful, but what seems to me a prudent and reasonable restraint; and consequently I

am

am of opinion that the daughters are not intitled to the 2000*l.* to be raised by this settlement until the time of their marriage with such consent.

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The schoolmen distinguish between the pain of sense, and the pain of loss; but the *Pæna damni* is but improperly called a penalty, and yet that is all the penalty in the present case.

I proceed to consider the additional portions given by the will, and must admit some difference between them and those by the settlement; for the portions by the will are to be raised out of a personal estate, and not as those by the settlement out of land; for though a term of 500 years is vested in Mr. *White* and Mr. *Kenrick* the defendants, to raise the sum of 3100*l.* and 1000*l.* by sale or mortgage of the lands included in that term, yet that was intended to replace those sums, which had been drawn out of the personal estate, toward the purchase of those lands, and when raised were to be paid to his executors, and be accounted as part of his personal estate; and then the will directs, That out of the money so to be paid by the trustees to his executors, and out of all the other monies, bonds, bills, notes, &c. there should be paid to such of his daughters unmarried, and unprovided for at his decease, 2000*l.* as an augmentation of their fortunes provided for them by the said indentures of lease and release, which are taken notice of and recited in the will;

To be paid at such times, and subject to such conditions, provisions, limitations and agreements, as their original portions are by the said indenture subject and liable.

Now the words of the will must import, that this additional 2000*l.* a-piece by the will must be paid as and in like manner with the 2000*l.* a-piece by the settlement; and then it is as if he had said, *I give an augmentation of 2000*l.* to each of my daughters, when she marries with her mother's consent,*

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Or it must import, That Sir *Thomas Aston* meant to give 2000*l.* a-piece to his daughters absolutely and unconditionally, and then the subsequent words (*to be paid at such times as the original portions*) are a designation only of the time of payment.

But this last construction cannot be put upon the will without great violence to the words. For first, These words (*to be paid at such times, subject to such conditions, limitations and agreements as the original portions are liable to*) must be rejected as useless and insignificant.

Secondly, The 2000*l.* by the will is meant as an augmentation of the portions by the settlement, and therefore could not be intended to be paid but when the original portions were so, which the will designed to augment.

Thirdly, Here is no express devise or bequest of 2000*l.* to each daughter, and then a time limited for the payment, as in those cases which have been construed to give a present interest to the legatee, though *Solvendum in futuro*; as where 100*l.* is given to a child to be paid at full age, or with interest at his full age. *Dy. 59. b. in the Margin. God. Orph. Leg. c. 17. sec. 11. 2 Vent. 342. 2 Vern. 137. 508. 673.*

Supra p. 722.
737.

I say, admitting that the distinction holds in personal legacies, where the devise is to *J. S.* at his full age, or to be paid at age, yet in these cases there is a devise, or disposition of the legacy.

But in this will (as if it was intended to avoid such construction) there is no gift or devise of 2000*l.* to his daughters in express terms; but a direction, that out of his mortgages, bonds, money, &c. there should be paid to his daughters 2000*l.* at the time the original portions are payable, which though it may be as effectual in point of operation or benefit, yet it is different in the manner of expression, and is not a direct gift to the legatee, which is relied on in these

these cases, as a reason to construe it a present interest in the legatee.

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Fourthly, It is provided by the will, that if the daughter died before her original portion becomes payable, the money shall not be paid to her executor or administrator.

But suppose the will can admit this construction, what will be the consequence? Will a Court of Equity direct the payment of the portion presently, when the will directs the payment at the time their original portions become payable, that is, at the time of the marriage with the mother's consent?

So that even upon this construction I do not see how the plaintiff can at present be intitled to these portions.

But taking the will to import, that the augmentation of the portions designed by the will shall become due to the daughters, when they marry with the mother's consent, the only question that will remain is this:

Whether when a man devises 2000*l.* out of his personal estate to his daughter upon a condition precedent, that is, upon her marriage with the mother's consent, it be proper for a Court of Equity to decree the payment of such portion on her marriage without such consent?

What one might in compassion wish or desire is not to have place in a court of justice; which is not to make men's wills, but to compel the performance of them, according to the true intent and meaning of the testator, as far as it can be collected from his words, and as far as is consistent with the rules of law and conscience.

Now that it was Sir *Thomas Aston's* real intention, that his daughters should have only the maintenance of 70*l.* or 100*l.* *per annum*, unless they married with the mother's consent, and that the 2000*l.* by the settlement and 2000*l.* by the will should not be paid them, unless they did so, seems to me evident upon what I have already observed; and when by

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his codicil he adds all other his estate subject to his wife's jointure (except his *Cheshire* estate) to the term of 1000 years, vested in Serjeant *Cheshire* for the better raising his daughters' portions; by an indenture in 1712. he is so cautious, that the same are therein and thereby appointed to be raised and paid; which shews that it was his fixed and permanent intention.

And though in the trust of the *Cheshire* estate limited to Serjeant *Cheshire*, till his sons are of twenty-five years, to raise maintenance for his sons till that age, he directs the residue of the profits to be applied towards payment of the said portions for his daughters, which is a new trust; I see not how it can be thence inferred, that the portions should be paid otherwise than before directed.

This being Sir *Thomas Aston's* settled intention, why should it not prevail?

The condition from what I have said appears to me to be lawful.

A condition precedent to any other personal legacy, must be performed before any interest or title to the legatee can accrue.

supra p. 737.

By the Civil Law (as was before said) a legacy given *cum pubescerit, cum in familiam nupserit, &c. nisi tempus conditionis obtingit, neque res pertinet neque dies legati cedere potest.* Dig. l. 36. tit. 2. l. 21, 22.

Is there any instance in the common law, any instance in this Court to the contrary?

I have not heard any; the only case which hath the semblance of a condition precedent, is that of *Semphill & Ux'* vers. *Bailey*, *Pre. Ch.* 562.

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But the two Judges who decreed that case, looked upon it as a loose inconsiderate way of speaking; it appeared not that he meant it to stand as a condition precedent to his daughter

daughter *Sarah's* portion of 1000*l.* which he meant she should have at her age of twenty-one, or marriage, without saying that such marriage should be with consent; and to another daughter, the words were thrown in between the 1000*l.* given her in money, and what was settled on her in land.

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In the case of *Creagh* and *Wilson*, which was a personal legacy given on a condition precedent which was not performed, and therefore not obtained in this Court. 2 *Vern.* 572. *Supra* p. 745.

In the case of a limitation over, it is admitted, that a personal legacy given on a condition not to marry without consent, should be lost if the condition be broken.

Supra p. 730.
1 Bro. Ch. Rep.
303.

In this case the residue of his personal estate, not by him before given and bequeathed, is expressly given to his wife, which is equivalent to a limitation over, if that were necessary, where the condition is precedent and never performed. (5)

In the case of *Creagh* and *Wilson*, there was no limitation over.

In the case of *Aston* and *Aston*, 2 *Vern.* 452. (a) (which seems to be in this very family) the limitation over was only to make good the portions of his other daughters, if any deficiency, or otherwise of his sons; and that being a condition subsequent, and thought somewhat an hard case, might make Sir *Thomas Aston* so careful in the present, to give his daughter

(a) Prec. Ch.
226.
2 Eq. Abr. 212,
pl. 2. S. C.

(5) The cases of *Amos v. Horner*, 1 Eq. Abr. 112. pl. 9. and of *Scott v. Tyler*, 2 Bro. Cha. Rep. 431. have determined that a bequest of the residue, notwithstanding some contradictory authorities upon the subject, is equivalent to a limitation over where the condition is precedent and never performed. Lord *Hardwicke* in the case of

Wheeler v. Bingham, 3 Atk. 364. which was determined upon its own particular circumstances, declares himself to be of opinion that an express devise, that, if the legatee should not perform the condition, the legacy should sink into the residuum, amounts to a devise over.

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ters their portions upon the like condition, but to require that it should be precedent to the payment of them.

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Fifthly, The only reason why Courts of Equity have come in to allow legacies given on condition to be void if the legatees marry without consent, seems to be to keep up a conformity between the determinations of this and the ecclesiastical Courts, where such a legacy would not be defeated though the condition subsequent should be broken and the legatee marry without consent.

2 F. Wms. 628.
11 N.

But suppose the question in this case was in the Ecclesiastical Courts; a pecuniary legacy is given to be paid to a daughter when she marries with her mother's consent, will the Ecclesiastical Court decree it before such marriage?

Swinb. 4 part.
sec. 4. p. 257.

The difference *Swinburne 4 pt. sec. 17. f. 311.* takes, is where a legacy is given at a certain time, and where to be paid at a time uncertain; for so he says it is lawful for the testator to do; in the first case he saith, the legatee, or if he die, his executor may demand, and recover the legacy after the time is past, unless the meaning of the testator be contrary, or it be a personal service which cannot be transmitted; but if the legacy be given after an uncertain time, the legatee dying in the mean time, his executor or administrator cannot demand it, but is utterly excluded; as if a man gives 100*l.* when his daughter shall be married, if the legatee dies before the marriage of the testator's daughter, the legacy is utterly extinguished; so if 100*l.* is given when his son shall die, though it be certain that he will die, yet if the legatee die before his son's death takes place, the legacy is extinguished in the same manner as if it had been conditional. And the principal cause why a legacy given after another's death is reputed to be conditional, he saith, is because it is not only uncertain when he will die, but whether he will die before the legatary, and consequently the intention of the tes-

tator seems to be, that the legacy should not be transmissible. (6)

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And he saith that it is not material, whether the uncertainty be joined to the substance of the bequest, or to the execution of it, for in both cases the legacy is reputed conditional; as if I give *A.* 100*l.* when my daughter shall marry, or to be paid when my daughter marries, for if *A.* die before her marriage, in either case the executor cannot demand it.

This is agreeable to what Lord *King* saith, in the case of *Tates and Fettiplace*, 2 *Vern.* 416.

The intent of the testator is the predominant rule to be observed. *Swinb.* p. 315. [757]

In all sorts of legacies, two effects of right of the legatee are necessary to be considered.

Domat. Lib. 4.
tit. 2. sec. 9.
Par. 7.

First, That which makes him master of the thing, whether he may demand it, or not, as yet.

Secondly, That which puts him in a condition to demand it: Of the first it is said, the time is come when the legacy vests and becomes due; of the second, the time is come when he may demand it.

If a legacy is pure without terms, it is due and may be demanded at the death of the testator; if a term is prescribed, it is due at the death of the testator, and may be demanded when the day or term of payment comes; if a condition is added, both effects take place when the condition is performed. *Dom. l. 4. tit. 2. sec. 9. Par. 7.*

(6) The following are the words of the Roman law upon this subject, "Legatis, quæ relinquuntur, aut dies incertus, aut conditio adscribitur: aut, si nihil horum tactum sit, præsentia sunt. Cum dies certus adscriptus est, quamvis dies non venerit, solvi tamen possunt; quia certum est ea debita iri. Dies autem incer-

tus est, cum ita scribitur: *Hæres meus cum morietur, decem dato*; nam diem incertum mors habet ejus, et ideo, si legatarius ante decefferit, ad hæredem ejus legatum non transit; quia non cessit dies vivo eo, quamvis certum fuerit moriturum hæredem." *Dig. Lib. 35. tit. 1. lex. 1.*

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If the right is vested, he transmits it; if the time is not come when the legacy was due, he does not transmit it. *Dom. Lib. 4. tit. 2. sec. 9. Par. 8.*

Legacies left to an uncertain time are conditional. The term of an uncertain day implies a condition. *Domat. Lib. 4. tit. 2. sec. 9. Par. 15.*

The Lords Chief Justices Sir *William Lee* and Sir *John Willes*, who assisted the Lord Chancellor *Hardwicke* upon this appeal, being of the same opinion, his Lordship was pleased to concur; and thereupon the decree of his Honour the Master of the Rolls was reversed.

A

T A B L E

O F

The Principal Matters,

CONTAINED IN THE TWO VOLUMES.

Abatement.

1. **A**N avowant in replevin may abate his own avowry for part of the rent distrained for *before*, but not *after* judgment. *Richards v. Cornesford* Page 42.
2. Plaintiff in replevin shall not pay costs when the writ abates. *Smith v. Walgrave* 122
3. *Cepit in alio loco* is to be considered as a plea in bar, and not in abatement. *Ibid.* in note *ibid.*
4. A plea in abatement shall not be avoided by another original. *James v. Matthews* 157
5. Where a defendant pleaded in abatement, and the plaintiff by his replication concluded with praying judgment and damages, it was adjudged a discontinuance. *Bodmyn v. Child* 189
6. A defendant in replevin may plead property either in bar or in abatement. *Loveday v. Mitchell* 247
7. A plea in abatement was holden bad and repugnant, where it says that

- there are two persons *in com. Devon.* of the same name, without distinction. *Hussey v. Hussey* Page 260
8. If a cause in an inferior court be alleged *infra jurisdictionem cur'* though it be out of the jurisdiction, if the defendant does not plead to the jurisdiction, he shall not afterwards have a prohibition. *Marriott v. Shaw* 278
 9. *Misnomer* is improper for a demurrer, and ought to be pleaded in abatement. *Cornish v. Tressey* 541
 10. A misnomer must be pleaded in proper person, and not by attorney. *Ibid.* in Note *ibid.*
 11. Where the cause of action arose out of the jurisdiction of the court, the defendant in the inferior court ought to plead it; and if he does not, the affair of the jurisdiction is over, and he shall not take advantage of it in any collateral action against the plaintiff, or the officer who executes the process. *Moravia v. Sloper*, in Note 2 576

12. In a plea of disability of the plaintiff, that he was a recusant convict, that he did not take the oaths at the quarter sessions; it is not enough to say *et hoc parat' est verificare*, unless he adds *per Record'* Moore v. —

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13. When outlawry is pleaded in abatement, it must be pleaded *sub pede fignilli*. *Ibid.*

14. So must excommunication. *Ibid.*

15. A plea in abatement that the defendant was a Mercer, and no Gentleman, as named in the writ, was holden good. *Robinson v. Mead* 371

Acceptance. Acceptor.

1. The acceptor of a bill of exchange drawn upon him for a debt exceeding 100 l. incurred at play, may plead the stat. 16 Car. 2. c. 7. *Huffey v. Jacob* 5
2. An acceptance to pay a bill of exchange according to the tenor made after the time appointed for its payment, is a general acceptance to pay upon demand. *Gregory v. Walcup* 75
3. An acceptance after the time of payment elapsed is good. *Ibid.* 76
4. A stranger may accept a bill for the honour of the drawer, and by such acceptance becomes liable. *Ibid.* *ibid.*

Account.

1. Where tenant in common declares against another as receiver, it ought to be shewn by whose hands he receives, otherwise he ought to be charged as bailiff. *Walker v. Holyday.* 272
2. Where a person is charged as bailiff, he cannot plead that at another time he was charged as receiver. *Ibid.* in Note 2. *ibid.*
3. An account was directed for all monies received on the sale of stock pledged, notwithstanding the day of redemption was past; it not appear-

ing that the defendant had sufficient stock at the day. *Harrison v. Hart* Page 393

Acorns.

1. Are a small tithe. *Wallis v. Pain* 640
2. It is necessary that they should be gathered and sold, for if they drop of themselves from the trees in the season, and the owner's cattle eat them, in that case no tithe shall be paid of them. *Ibid.* in Note 2 *ibid.*

Action.

1. In an action against a stranger, plaintiff need not shew title in himself. Otherwise where an owner of the soil is defendant. *Stroud v. Birt.* 7
2. Lies for negligently keeping fire in defendant's close, by which plaintiff was damaged. *Turberville v. Stamp* 33
3. An action lies not for a general nuisance, where a particular damage to the plaintiff is not laid. *Iveson v. Moor* 58
4. An action lies against the members of a corporation by their private names for a false return to a *Mandamus* by their corporate name. *King v. Rippon* 86
5. An action lieth against a farrier for refusing to shoe a horse. *Lane v. Cotton* 106
6. A writ of covenant for a fine is a real action. *Hunt v. Bourne* 124
7. If a creditor desires his debtor to pay part of the debt to a third person to whom the creditor is indebted, and indorse it on a note from him to his creditor, if the debtor makes the indorsement, but refuses to pay the money, the third person may recover it from him in an action for money had and received. *Ward v. Evans* 138
8. An action on the case does not lie for a malicious suit, *pendente lite* 190
9. An action lies for knowingly suing in a court where there is no jurisdiction of the cause. *Ibid.* *ibid.*

10. And also for suing in a proper court, but proceeding there veraciously. *Ibid.* Page 190.
11. An action will lie for such excessive damages being alledged, that the defendant could not put in bail. *Ibid.* 191
12. Does not lie for a suit brought without cause. *Ibid.* *ibid.*
13. An action may be maintained where the *Sciens* is alledged of a fact which may be proved. But where the *Sciens* goes to a thing which lies solely in the breast of the party, if the action is not otherwise maintainable, the *Sciens* will not maintain it. *Ibid.* 192
14. Where money is paid under a void authority, an action will lie to recover it. *Attorney General v. Perry* 488
15. Where money is paid on a mistaken account, or by means of a deceit, an action will also lie. *Ibid.* *ibid.*

Administration. Administrator.

1. Grant of it when well pleaded. *Truelock v. —* 17
2. If letters of administration are lost, new letters may be granted after an action brought. *Barton v. Fuller.* *ibid.*
3. Judgment against an administrator by confession or default *pendente lite* is an admission of assets, and he is estopped to say the contrary on a *devastavit* returned. *Rock v. Layton* 87
4. A Mandamus does not lie to the spiritual court after administration granted. *Blackborough v. Davis* 96
5. Administration granted to an improper person is not void, but voidable. *Ibid.* *ibid.*
6. Administration *durante minore etate* of one intitled to the administration, doth not determine until the infant hath attained the age of twenty-one. *Freke v. Thomas* 110
7. Administration granted during the minority of an executor, ceases upon his attaining the age of seventeen. *Ibid.* 112

8. The difference between an administration repealed upon a citation, or upon an appeal. *Anon.* Page 151
9. If a plea be to an action brought by one as administrator, that *A.* made an executor, the defendant ought to traverse that *A.* died intestate. *London v. Beffingham* 156
10. Where a man has *bona notabilia* in several peculiars, administration must be granted by the archbishop. *Pelling v. Whiston* 202
11. An administrator was permitted, after a regular judgment was set aside upon payment of costs, to plead *plene administravit* generally, which was looked upon as the general issue. *Leaver v. Witcher*, in Note 561

Admission.

1. Where persons have a right to their freedom, the tortious refusal of the mayor does not make their votes void, for admission is but a ceremony. *Austin v. Osborn* 243

Advowson.

1. A grant of a manor, with all advowsons, &c. thereunto belonging, will not extend to an advowson severed in ancient times, though it was appendant to the manor 300 years ago. *King v. Durham (Bishop of)* 361

Agreements.

1. An agreement which might have been performed within a year after the making of it, is not within the statute of frauds, though it should not be performed until the year is expired. *Anon.* 50

Allegation.

1. An allegation in an action for words, that *præd, Jana adtunc et ibidem colloquium*

quum habens cum servo quer', is sufficient, for the *adunc* refers to the whole clause. *Upton v. Pinfold*

Page 267

Amendment.

1. That process which has not the roll for warranting the amendment, cannot be amended. *Juxon v. Naylor*, in note 60
2. Where amendment shall be allowed. *Ibid.* *ibid.*
3. A *Fi. Fa.* bearing teste on a day out of term cannot be amended. *Ibid.* *ibid.*
4. A mistake of the plaintiff's name instead of the defendant's is amendable after verdict without defence. *Abraham v. Bunn* 250
5. A *Venire* was tested after the return of the writ, and it was holden amendable. *Philips v. Smith* 282
6. So if a *Venire* be tested the day before issue joined or plea pleaded, it shall be amended, for the roll is the warrant for it. *Ibid.* *ibid.*
7. So if the teste be the same day with the return. *Ibid.* *ibid.*
8. So if the teste be upon a *dies non juridicus*, as upon a Sunday. *Ibid.* *ibid.*
9. So if it be tested out of term. *Ibid.* *ibid.*
10. So where the return of the *Venire* was not made pursuant to the award on the roll, it was amended. *Ibid.* *ibid.*
11. A *Distingas* was allowed to be amended, where the word *Vic'* was omitted. *Ibid.* 284
12. There is no difference between civil and penal actions as to amendments at common law. *Ibid.* in note *ibid.*
13. Where continuances are omitted, it is but the fault of the clerk, and they may be entered at any time before judgment. *Ibid.* 285
14. Continuances are always amendable of course in the King's Bench. *Ibid.* *ibid.*
15. If the action be laid in one county and the *Venue* in another, it is a *Jeo-*

- fail, and helped by the stat. 4 Ann. c. 16. *Houves v. Haflerwood* Page 555
16. Where the name of the defendant is made use of in the declaration by mistake, instead of the plaintiff's, it shall be helped after a verdict. *Blacklock v. Mariner* 557
 17. The mistake of the name of a third person is not amendable, though a misnomer of the plaintiff or defendant is. *Harvey v. Stokes* 566
 18. *Viscomiti Lond' precipimus tibi*, instead of *Viccomitibus Lond' precipimus vobis*, was holden amendable after verdict. *Anon.* 580
 19. The plaintiff in the record of *Nisi Prius*, omitted the words, *Et præd' quer' scilicet*; but it was holden amendable by the original record. *Walker v. Lester* 376
 20. A mistake in a recovery, whereby two of the villis were omitted, was allowed to be amended by the deed which had the uses. *Dean v. Coward* 386
 21. A *Scire Facias* upon a recognisance against the bail recited the record to be *in hac parte*, instead of *in ea parte*, and it was holden immaterial. *Piper v. Thompson* 418

Amerciament.

1. If a tenant be amerced in the manor court, and die before it be levied, the amerciament is lost. *Att. Gen. v. White* 435

Intent Demesne. Vide Fines.

Appeal.

1. Where the Court quashes all proceedings on a writ of appeal for murder, the appellant may be admitted to prosecute his appeal by bill against the appellee in *custod' Mar'*. *Reeses v. Trindle* 257

Arbitration. Vide Award.

Arrest.

1. Privilege from arrest shall not extend to a person who attends his own cause after his departure from *Westminster*. *Harrison v. Hart* Page 411

Assigee.

1. A bill of revivor lies not by an assigee. *Harrison v. Ridley* 589

Assumpsit.

1. Assumpsit to deliver oatmeal on board a vessel (to be brought by the plaintiff), on or before the 18th of *January*; breach that he did not deliver upon the 18th is good after verdict. *Harman v. Ouden* 89
2. It is sufficient to maintain an *assumpsit* if the consideration was a benefit to the defendant, or a prejudice to the plaintiff. *Thorpe v. Thorpe* 98
3. The release of an equity of redemption is a good consideration for an *assumpsit*. *Ibid.* 99
4. Where the doing of a thing will be a good consideration, the promise to do it is also good. *Ibid.* *ibid.*
5. *Assumpsit* lies not upon mere communication. *Cartlich v. Eyles* 560

Attainder.

1. A person restored after an attainder for high treason, shall have the same equitable interest in every part of his estate, as he had before the attainder. *Clanrickard v. Bourk* 237

Attorney.

1. A copyholder may make surrender in Court by attorney. *Parker v. Keck* 85
2. If an attorney sues by original he waives his privilege. *Poulton v. Goddard* 143

3. The following words, *I never forged any man's band, but you are a forging rogue*, when spoken of an attorney held actionable. *Anon.* Page 262
4. The Court refused to order an account in equity for an attorney's bill taxed by a Prothonotary of the Common Pleas. *Osbaldiston v. Croft*. 612

Averment.

1. Where a verdict hath found words spoken of the plaintiff, as brother of the defendant, it is sufficient, though there was no averment in the declaration that he was his brother. *Castle v. Bailey* 528
2. Where words are spoken in *Latin*, there must be an averment that the by-standers understood the language, so if spoken in *Welsh*. *Ibid.* 529
3. And an averment that the hearers understood *Lingua Romanam*, is not sufficient where the words were *Latin*, for that also imports *Italian*. *Ibid.* in note *ibid.*

Avoidance.

1. Avoidances before conviction are as much within the stat. 3 *Jac.* 1. *cap.* 5. as avoidances after, and are equally within the remedies provided by that act. *Fitzherbert v. Reeves* 169
2. If a patron dies after his church becomes void, and before he hath presented, the avoidance is a chattel, and goes to his executor. *Ibid.* 176

Avowry.

1. An avowant in replevin may abate his own avowry for part of the rent distrained for *before*, but not *after* judgment. *Richards v. Cornesford* 42
2. A man who distrains for one cause may avow the taking for another. *G. oen. eli v. Burwell* 78
3. When the defendant in replevin makes confance, or avows that the property is in himself, it seems to be sufficient

sufficient without a traverse. *Love-day v. Mitchell* Page 247

4. If a defendant avows, where he ought to make confession, it is but form. *Marriot v. Shaw* 276

Award.

1. A clause in the condition of an arbitration bond that the obligor will consent to have the submission made a rule of Court, determined to be a consent for that purpose. *Baily v. Chiefely* 114
2. The Court cannot receive any complaint to set aside an award, until the submission is made a rule of Court; and a consent in the submission bond, to make the award a rule of Court, instead of the submission will not warrant their interposing. *Ibid.* in note *ibid.*
3. Where a submission is pleaded, and no place shewn, it is bad. *Barker v. Palmer* 141
4. When one undertakes to submit to an award for another, he shall be bound by it. *Shelf v. Baily*. 163
5. If a person submits to an award on the behalf of a stranger, his bond shall be forfeit, if the stranger does not do, what the award requires him to do. *Ibid.* 184
6. An action of debt lieth not against an executor upon an award made upon a submission by the testator to a reference, though the award was in writing. *Att. Gen. v. White* 435
7. A submission of all matters in difference, imports all matters which either party had jointly or severally against each other. *Atbelson v. Moon* 547
8. An award was holden good notwithstanding some objections in point of form. *Thomlinson v. Arrifkin* 328
9. An award to pay costs to be taxed by the prothonotary was holden good. *Ibid.* 329
10. An award to pay costs of suit in an inferior court is void. *Ibid.* *ibid.*
11. An award to pay costs in such a suit is sufficient. *Ibid.* 330

12. In a parol award, the very words need not be expressed, the effect and substance of them are sufficient. *Ibid.* Page 330

Bail.

1. SPECIAL bail need not be given in an information or action *qui tam* on a penal statute, unless it is for an offence in the exportation of wool. *Presgrave v. —* 75
2. Where the plaintiff hath been nonsuited for a defect in the declaration, the defendant shall be admitted to common bail upon a new action brought. *Quere, Almanzor v. Davilack* 94
3. A sheriff cannot take a bail-bond upon an attachment for a contempt. *Field v. Workhouse* 264
4. A sheriff may take bail upon an attachment of privilege, attachment upon a prohibition, and attachment in process upon a penal statute. *Ibid.* *ibid.*
5. Bail shall be given in an action of debt on a judgment, notwithstanding a writ of error, if there is no bail in the original action; otherwise not. *Wayman v. Wayman* 556
6. Bail is not requisite upon bringing a writ of error, upon a judgment in an action of debt founded upon a prior judgment, because it is a *casus omisus* out of the stat. 3 Jac. 1. c. 8. which is to be taken *literally*, and not extended by construction. *Ibid.* in note *ibid.*

Bailiff.

1. Where there are two warrants, the one lawful and the other unlawful, and the party is taken upon the illegal one, the bailiff may justify himself by the authority of the legal warrant, and to traverse it is ill. *Greenzeit v. Burawell* 78
2. Where tenant in common declares against another as receiver, it ought to be shewn by whose hands he receives

ceives, otherwise he ought to be charged as bailiff. *Walker v. Holyday*

Page 272

3. The difference subsisting between bailiff and receiver. *Ibid.* in note 2 *ibid.*
4. Where a bailiff is charged directly with a tort, it ought to be shewn that he is bailiff of a liberty which has the return of writs; but otherwise it is sufficient to shew generally, that he is such a person who has authority to take bail. *Keld v. Harding* 378

Bailment.

1. Its different divisions. *Coggs v. Barnard* 133
2. If a man who is not a common carrier, and who is not to receive a premium, undertakes to carry goods safely, he is answerable for any damage they may sustain through his neglect or default. *Ibid.* *ibid.*

Bankrupt.

1. Where a statute authorises a certain proportion of a man's creditors to enter into a composition with him, and declares that such a composition being entered into for the equal benefit of all his creditors shall bind all; a composition to take a certain sum in the pound for the debts due to such of the creditors who should sign it, is a composition within the statute for the benefit of all the creditors, and all will be entitled to it. *Falsham v. Cudworth* 112
2. In an action against a bankrupt for a debt due before he became a bankrupt, he may plead that the cause of action accrued before his bankruptcy; but he must plead it *vigore statuti*. *Fyson v. —* 205

Baron and feme.

1. A *Stare Facias* was brought by baron and feme upon a judgment recovered Vol. II.

by the feme, while sole, and after execution awarded the husband dies, a right is attached in the wife. *Anon.*

Page 31

2. If the husband had survived, he would have had the benefit of the judgment. *Ibid.* 32
3. A bond given by an obligor, who afterwards marries the obligee, the condition of which cannot be broken during coverture, is not extinguished by such intermarriage. *Gage v. Allen* 66
4. Where a right or duty may by possibility accrue to the wife during coverture, the baron may release it. *Ibid.* 69
5. If *A.* has a term in right of his wife, and purchases the reversion, it is no extinguishment because he possesses them in different rights. *Gage v. Allen* *ibid.*
6. Where Baron and Feme are tenants in tail to them and the heirs of their bodies, and the baron levies a fine and dies, the estate revives as to the wife, who shall be tenant in tail, and then ceases as to the issue, who shall be barred by the father's fine *Thornby v. Fleetwood* 21
7. Whether husband seized jointly with his wife, can without her make a good tenant to the Precipe. *Goodtitle v. Bradburne* 564
8. In case an husband dies before a legacy becomes payable to his wife, it is in the nature of a *Chose in action*, which will survive to the wife. *Brotherow v. Hood* 725
9. If the husband had had a decree for the legacy, and had died before he received it, it would have gone to the wife. *Ibid.* in note *ibid.*

Bastard.

1. Where a bastard is said to be the son of no one, it is intended in civil respects only, and where there is no inheritance. *Haines v. Jeffreys* 3

Bills of Exchange and Promissory Notes.

1. The indorser by superscribing makes in effect a new bill of exchange. *Hussey v. Jacob* in note Page 5
2. The acceptor of a bill drawn upon him for a debt exceeding 100*l.* incurred at play may plead the stat. 16 Car. 2. c. 7. *Ibid.* *ibid.*
3. All securities given by a third person for money lost at play are equally void with those given by the party himself. *Ibid.* *ibid.*
4. Otherwise where a security is given by the loser to a *bonâ fide* creditor of the winner. *Quere.* *Ibid.* *ibid.*
5. A drawer of a bill of exchange, though given without a consideration, shall not be relieved against a third person to whom it was assigned for an honest debt. *Anon.* 43
6. If a man has a bill payable to him or bearer, and delivers it over for money received without indorsing it, it is a plain sale of the bill, and he who sells it does not become a new security; but if he had indorsed it, he had become a new security and had been liable upon the indorsement. *Bank of England v. Newman* in note 57
7. An acceptance to pay a bill of exchange according to the tenor made after the time appointed for its payment, is a general acceptance to pay upon demand. *Gregory v. Walcup* 75
8. An acceptance after the time of payment elapsed is good. *Ibid.* 76
9. A stranger may accept a bill for the honour of the drawer, and by such acceptance becomes liable. *Ibid.* *ibid.*
10. A bill payable to the order of any one, shall be paid to him or his order. *Ibid.* *ibid.*
11. In an action on a promissory note against the drawer, the plaintiff need not allege notice to the defendant of the indorsement. *Skip v. Hook* 563
12. In an action on a promissory note against the indorser, there ought to be evidence of a demand upon the

drawer; but that is a fact to be left to a jury. *Pardo v. Fuller* Page 579

13. To entitle the indorsee of an inland bill of exchange to bring an action against the indorser, upon failure of payment of the drawer, it is not necessary to make any demand of, or enquiry after the first drawer. *Ibid.* in note 580
14. Analogy pointed out between promissory notes, and inland bills of exchange. *Ibid.* in note *ibid.*
15. An original bill payable to one and his order, is assignable afterwards to whomsoever it is indorsed, though the words *or his order* be omitted. *More v. Manning* 311
16. The mere omission of words to give a power of transfer, will not make an indorsement restrictive. *Ibid.* in note 312

Board.

1. A charge for board is not to be deducted out of money due, unless it was so agreed upon. *Hungate v. Fotbergil* 613

Bond.

1. Bond for deputy to pay half the profits of an office being within the stat. 5 & 6 Edw. 6. c. 16. to the principal, and to retain the other half to himself is good. Otherwise had it been for a sum certain. *Culliford v. Cardonell* 1
2. A bond given by an obligor who afterwards marries the obligee, the condition of which cannot be broken during coverture, is not extinguished by such intermarriage. *Gage v. Aston* 67
3. A debt upon bond and a debt due for rent upon a lease are equal in degree. *Ibid.* *ibid.*
4. In an action upon a joint obligation it must appear that all executed it, otherwise it is bad. *Fitzgerald v. Cragg* 139
5. Where two are jointly and severally bound in a bond, a release to the one

one discharges the other. *Ibid.* in note Page 139

6. Trover lies for a bond. *Pickering v. Appaby* 355
7. In a defeazance to a bond, it is not necessary to recite the bond. *Trevet v. Angus* 568

By-Law.

1. A By-Law to restrain persons from exercising a trade, not being free of a borough, was holden void. *Parry v. Berry* 269

Carrier.

1. **A** Coachman is not liable for the loss of goods for the carriage of which he is not paid. Otherwise if he is paid. *Ujshare v. Aidee* 24
2. May refuse to receive goods before he is ready to set out. *Lane v. Cotton* 105
3. An action lay against a carrier before the statute of *Winton*. *Ibid.* *ibid.*

Certiorari.

1. A *Certiorari* lies to remove an order of justices of the peace upon a private Act of Parliament. *King v.* — 86

Civil-Law.

1. In what respect the knowledge of it is useful in connection with the *English* Law. *Harvey v. Aston* 734
2. Its doctrine respecting marriage, and conditions precedent and subsequent. *Ibid.* 735

Clothier.

1. Is within the stat. 4 & 5 *W. & M.* c. 23. and comprehended under the words *inferior tradesman*. *Bennet v. Thalbois* 26

Clover.

1. Clover seed is a small tithe, and as such due to the Vicar. *Wallis v. Pain* Page 633

Codicil.

1. A codicil signed and published in the presence of three witnesses, was holden a republication of a will, and that both made but one will. *Acherly v. Vernon* 381

Commissioner.

1. A term for years was determined to be a qualification for a commissioner of the land-tax. *Saunders v. Stevens* 270

Common.

1. Right of common of pasture and common of turbary will not hinder the lord's improvement by inclosure, if he leaves sufficient common for the tenants of the manor. *Fawcett v. Strickland* 578

Composition. Vide Tithes.

Condition.

1. There must be a particular act shewn by which the plaintiff is interrupted, otherwise the breach of a condition for quiet enjoyment is not well assigned. *Anon.* 228
2. Whether words in the condition which are repugnant to the plain intent of the parties shall be rejected. *Prideaux v. Roberts* 231
3. The non-performance of a condition though in its nature subsequent, is sufficient to bar the plaintiff's title to whatever he claimed upon such condition. *Acherly v. Vernon* 513
4. Performance must be shewn of a condition precedent, or nothing vests. *Ibid.* 516

5. Whether a condition be precedent or subsequent must be collected from the intent of the testator, to be collected from the words of the will. *Ibid.*

Page 517

6. A condition precedent, viz. marriage with the consent of the mother or others, annexed to a portion or legacy, is not to be dispensed with in a court of equity, though in the case of daughters' fortunes. *Harvy v. Aston*

726

7. Where a portion is given in consideration that a daughter should never marry, the condition is void. *Ibid.*

729

8. Where a legacy is given on consideration that the legatee should not marry without consent, and there is no devise over, the condition is void. *Ibid.*

ibid.

9. The ecclesiastical court makes no difference whether there is a devise over or not, but in both cases holds the condition void. *Ibid.*

730

10. Where a condition precedent copulative pervades an estate or trust, the whole must be performed before the estate or trust can arise. *Ibid.*

732

Construction.

1. It is a general rule in construction, that, where restrictive words are found at the end of the last sentence, which are properly applicable to the several sentences preceding, they shall extend to the whole. *Scott v. Schwartz*

684

Continuance.

1. If there be no continuances entered, you may enter the judgment as at the day in bank; but if continuances are entered, then you cannot go back, but must enter the judgment at the time of the continuances. *Blackall v. Heal*, in Note
2. Where continuances are omitted, it is but the fault of the clerk, and they

13

may be entered at any time before judgment. *Philips v. Smith* Page 285

3. Continuances are always amendable of course in the King's Bench. *Ibid.*

ibid.

4. The difference of the practice of the Common Pleas in this respect. *Ibid.*

Contracts.

1. A contract performable as well before as after a day mentioned in the statute 8 & 9 Will. 3. c. 32. at the election of the party, is not within that act of parliament. *Anon.*
2. Defendant being indebted to the plaintiff in the sum of 7000*l.* and plaintiff being indebted to defendant in 500*l.* it was agreed between them that in consideration that the plaintiff would forbear and give day of payment for the 7000*l.* for six months following, defendant would give a receipt and discharge for the 500*l.* The court determined that it was not an usurious contract. *Grant v. Gordon*

583

3. In a contract for stock, it must appear by the register itself to whose use the contract was made. *Rogers v. Wilson*

365

Conveyance.

1. Conveyance cannot operate by way of covenant to stand seised, where the intent of the party who conveys appears to be contrary to such a construction. *Darw v. Newborough*
2. A voluntary conveyance is bad in a Court of Equity, against bond debts contracted afterwards. *Amand v. Jersey*
3. Conveyances by way of use shall be construed according to the intention of the parties, and shall not be confined to the strict rules of conveyances at common law. *Makepiece v. Fletcher*

459

Conviction.

1. In a conviction on the stat. 43 Eliz. c. 7. for cutting down trees, the number and quantity of the trees ought to be expressly mentioned. *Queen v. Burnaby* Page 131
2. A conviction *super præmissis* for three penalties of five pounds each, for killing three hares, where it appears that it was done at the same time, is bad: for the statute does not give five pounds for every hare, it being all but one offence. *Marriott v. Sharu* 274
3. In a conviction on a statute it is necessary to negative all the qualifications contained in it. *Bluet v. Needs* 525

Copyhold. Copyholder.

1. Copyhold lands are parcel of the demefnes of the manor. *Winter v. Loreway* 40
2. If a lord of a manor cut down trees, where a copyholder may take them for repairs, trespass lies. *Albmead v. Ranger* 71
3. The lord cannot without a custom cut the trees of a copyholder. *Ibid.* 72
4. A surrender of a copyhold to the deputy of a deputy steward out of court is good. *Parker v. Kick* 84
5. A copyholder may make surrender in court by attorney. *Ibid.* 85
6. A copyhold estate surrendered to several, equally to be divided, and to their respective heirs, is not a joint estate, but an estate in common. *Fisher v. Wigg* 88
7. The surrender of a copyhold is to have the same favourable construction as a will. *Ibid.* 92
8. Where a copyhold is entailed by custom, a common recovery in the lord's court will bar the issue in tail, and those in remainder. *Hunt v. Bourne* 129
9. The heir of a copyhold, upon whom a copyhold descends, may maintain an ejectment, and may make surrender before admittance. *King v. Osborn* 241

10. He may also make leases before admittance. *Ibid.* in Note Page 241
11. If a copyholder, to whose use a surrender is made, prays to be admitted in court, and is refused, he shall be tenant against the lord, though the lord loses his fine. *Ibid.* 245

Corporation.

1. An action lies against the members of a corporation by their private names for a false return to a *Mandamus* by their corporate name. *King v. Rippon* 86

Costs.

1. When they shall be given upon the stat. 22 & 23 Car. 2. c. 9. *Lately v. Fry* 19
2. Where the title comes in question, or any thing is carried away, full costs shall be allowed. *Ibid.* 20
3. Plaintiff in replevin shall not pay costs when the writ abates. *Smith v. Walgrave* 122
4. An executor shall pay costs where he brings an action as executor, which he might have brought in his own name. *Hole v. King* 162
5. Costs are given in those cases where actions are brought which will not lie. *Bird v. Line* 191
6. Where the plaintiff joins in an immaterial issue, he is not entitled to costs. *Craven v. Hunley*, in note 3. 550
7. Upon a writ of enquiry executed after judgment by default in prohibition, plaintiff shall have costs. *Bettison v. Savage* 335

Courts.

1. When a new authority is constituted with power to fine and imprison, the persons invested with such authority are judges of record, for none but courts of record can either fine or imprison. *Greenwells v. Burwell* 79

2. From a court newly erected with power to proceed in a summary way different from that by the common law, no writ of error lies. *Ibid.* Page 80

Covenant.

1. A writ of covenant for a fine is a real action. *Hunt v. Bourne* 124
2. In covenant a breach assigned ought to be positive and certain. *Dummer v. Birch* 146
3. Where one person covenants with another that he shall have lands discharged of all rents, the covenantee ought to be discharged from a quit-rent. *Hammond v. Hill* 180
4. A covenant to enjoy without disturbance generally, shall be construed a disturbance by legal title; but where a man covenants expressly against those who claim or pretend to have a right, the breach is well assigned, though the disturber has no legal right. *Southgate v. Chaplin* 230
5. A covenant to keep a house in good and sufficient repair, and so to leave it, binds the covenantor to rebuild, if the house is burnt down by accident. *Chesterfield v. Bolton* 627
6. A lessee, who covenants to pay rent, and to repair with express exception of casualties by fire, is liable upon the covenant for rent, although the premises are burnt down, and not rebuilt by the lessor. *Ibid.* in Note 3 633
7. A covenant, though good in its creation, may be extinguished afterwards by the covenantor, to whom the covenantee was heir. *Mudge v. Mudge* 333
8. Words which cannot otherwise take effect shall amount to a covenant to stand seised. *Ibid.* 334
9. A covenant that, if the ship miscarries, the party shall lose his wages is unreasonable. *East India Company v. Atkins* 348
10. A covenant to pay interest upon interest is unreasonable. *Ibid.* 349
11. In covenant the plaintiff by his replication assigns several breaches, to

which the defendant does not rejoin; though the plaintiff cannot waive the breaches, (being entered on the roll) yet he may take judgment for want of a rejoinder. *Walker v. Priestley*

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Coberture. Vide Marriage.

Customs.

1. A custom to give notice of the setting out of tithes is good. *Gale v. Ewer.* in Note 23
2. To commit for refusing to come upon the livery in the vintners' company is good. *King v. Clerk* 24
3. A custom to build upon a new foundation to the obstruction of ancient lights is bad. *Anon.* in Note 274
4. By the custom of London, every citizen upon an ancient foundation may build his house as high as he pleases. *Ibid.* 273
5. Custom or prescriptions are only triable at common law. *Hodgson v. Atkinson* 603

Damages.

1. JUDGMENT shall not be arrested after a verdict where entire damages are given, though part of the time was to come at the time of trial. *Talder v. Hubburd* 231

Debt.

1. Lies not against executors, where the testator might have waged his law. *Attorney General v. White* 435
2. Nor upon an award made upon a submission by a testator to a reference, though the award be in writing. *Ibid.* *ibid.*
3. In an action of debt for a fine or an amercement in a leet, the defendant shall not wage his law, because the leet is a court of record. Otherwise had

had it been in a manor court. *Ibid* in Note Page 435

4. Debt lies wherever the common law or custom creates a duty. *Ibid.* *ibid.*
5. So where an act of parliament creates a duty. *Ibid.* *ibid.*
6. On the stat. 28 Eliz. c. 4. the sheriff may have debt for his fees. *Ibid.* *ibid.*

Decree.

1. Where there is a single witness against the defendant's oath, this is not sufficient evidence for a decree. *Speed v. Martin* 587

Defamation.

1. Words which do not directly charge the party with being a whore, are not such whereon the jurisdiction of the spiritual court ought to be disallowed. *Steward v. Allen* 235
2. The following words, *I never forged any man's hand, but you are a forging rogue*, when spoken of an attorney, held actionable. *Anon.* 262
3. An allegation in an action for words, that *præd' Jana adtunc et ibidem colloquium habens cum servo quer'*, is sufficient; for the *adtunc* refers to the whole clause. *Upton v. Pinfold* 267
4. The words, *You are as bad as thy wife when she stole my cushion*, were adjudged not actionable, without an averment that the felony was committed. *Ibid.* 268
5. The reason why actions of defamation are encouraged. *Castle v. Bailey* 530
6. In an action for words upon Not Guilty pleaded, Whether the defendant can be admitted to give evidence of the truth of the words spoken (when they import a felony) in mitigation of damages. *Smith v. Richardson* 552
7. The rule upon the subject. *Ibid.* in Note 553
8. Prohibition shall be granted to the spiritual court where a libel is for

words spoken of a clergyman, which are actionable at common law. *Hall v. Downes* Page 309

Delegates.

1. Where parties are dissatisfied with what two Delegates do in *actis ordinariis*, such as settling allegations, &c. the matter may be brought under the consideration of the Con-delegates. *Blunt v. Crook* 446

Demurrer.

1. On a general demurrer duplicity is not fatal. *Lamplugh v. Shortridge* 115
2. In a release pleaded, no place was alledged, and held a material omission on a general demurrer. *Barker v. Palmer* 141
3. When the defendant by his rejoinder departs from his plea, it is a good cause of demurrer. *Gambier v. Larkin* 553
4. In a *Scire Facias* on a recognizance of bail, the defendants demurred, because it was not sufficiently averred that the plaintiff was the same person to whom they were bound; but held no cause of demurrer. *Matraves v. Adlam* 573
5. The stat. 4 Anne, c. 16. does not give any remedy upon demurrer, but in matters of the same nature with those which are there specified. *Hedgethorn v. Thurlock* 305
6. An argumentative plea shall be aided by a general demurrer. *Wall v. Fulwood*, in Note 332
7. If a defendant pleads *Nil habuit in tenementis* to an action of debt for rent brought upon an indenture of lease, it is a good cause of demurrer. *Evans v. Fauconberg* 391

Deposit.

1. It is not reasonable to decree a deposit back which is made by way of security

curity to any one, where the person making it had a proper power and authority so to do. *Naisb v. East India Company* Page 462

Deputy.

1. Bond for deputy to pay half the profits of an office being within the stat. 5 & 6 Edw. 6. c. 16. to the principal, and to retain the other half to himself, is good. Otherwise had it been for a sum certain. *Culliford v. Cardonell* 1
2. The surrender of a copyhold to the deputy of a deputy steward out of court is good. *Parker v. Keck* 84
3. The sheriff's deputy is to be entered on record. *Bury v. Rabutin* 566

Descent.

1. Where the right of entry shall be tolled by descent and non-claim. *Makepiece v. Fletcher* 457
2. When a descent is cast, the heir of a disseisor has *jus possessionis*, because the disseesee cannot enter upon his possession, and evict him; but is put to his real action, because the freehold is cast upon the heir. *Ibid.* in Note 461

Vide Devise. Estates.

Devise.

1. If a man seised in fee in possession devise to another after the death of A. without issue, it is a void devise, on account of the remoteness of the contingency. *Badge v. Floyd* 65
2. A devise by the reversioner to take effect after the death of tenant in tail without issue, is an immediate vested devise of the reversion. *Ibid.* *ibid.*
3. Where the same estate is devised to a man which he would have taken by descent, he shall be in by descent, notwithstanding the possibility of a charge. *Clarke v. Smith* 72

4. A devise by a father to his second son, and his heirs for ever, and for want of such heirs, then to the right heirs of the testator, is an estate tail. *Nottingham v. Jennings* Page 82
5. Had the devise over been to a stranger, the second son would have taken a fee-simple, and consequently the devise over had been void. *Ibid.* 83
6. Where one devises to A. and his heirs generally, which would convey a fee, yet if there be a remainder over for want or upon failure of such heirs, to a person who might take the estate as heir; the word heirs is restrained to heirs of the body, and consequently A. has only an estate-tail by such devise. *Ibid.* in Note *ibid.*
7. If a man devise to one of several co-heirs, he shall take by devise, and not by descent. *Redding v. Roydon* 123
8. A devise with the following words, *Whatsoever else I have in the world*, will pass an estate in fee. *Hopswell v. Ackland* 164
9. A devise to one indefinitely, without limiting any estate to him, gives him only an estate for life. *Ibid.* 167
10. A devise of all his estate in such lands passes a fee. *Ibid.* *ibid.*
11. So a devise of all his inheritances. *Ibid.* *ibid.*
12. The words *rest and residue of his estate* are sufficient to give the devisee not only the lands not before disposed of, but also the estate not disposed of in land devised to another. *Ibid.* 169
13. A devise to one for life, and then to be at her disposal, provided she disposed of the same after her death to any of her children, was holden only an estate for life in the mother. *Dighton v. Tomlinson* 194
14. A devise of lands to one to sell is a fee simple. *Ibid.* *ibid.*
15. A mere recital will not amount to a devise. *Right v. Hammond* 234
16. A will in these words, *I make my niece executrix of my goods, lands, and chattels*, cannot be construed into a devise of the land, neither will it sub-

ject

- ject it to the payment of debts. *Piggott v. Penrice* Page 254
17. A devise of an equity must be governed by the same rules as the devise of a legal estate. *Att. Gen. v. Young* 427
18. A devise to *E. H.* and her heirs, and if she and *D. S.* die without issue, the devisor gives several annuities charged upon the premises to charitable uses; held that *E. H.* had an estate in fee. *Scraper v. Rhodes* 542
19. Where there is a devise to one and his heirs, and to another and his heirs in another part of the will, they are joint-tenants. *Ibid.* 544
20. Where a devise or settlement of lands is made by will or deed, charged with portions for younger children, payable at age or marriage; if the person dies before the portion becomes payable, it shall sink into the estate for the benefit of the heir. *Hutchins v. Foy* 719
21. A devise to a man desiring him to pay a sum in gross carries a fee. *Salmon v. Denham* 323
22. A difference is taken where the money is to be paid out of the yearly profits. *Ibid.* 326
23. A devise of all his estate whatsoever comprehends all that a man has, real or personal, and when there is a surrender to the uses of his will, a copyhold estate will fall under the same construction. *Scott v. Aiberry* 337
24. A man devises to his wife in tail general, remainder to *J. S.* in fee; and the wife with a subsequent husband suffers a recovery, and it was holden good against the heir of the devisor, notwithstanding the stat. 11 H. 7. c. 20. *Hughes v. Clubb* 369
25. Upon a devise that if *William*, the eldest son of the testator, should happen to die without issue, that then, and not otherwise, after *William's* death, the estate was to go over to his son *Richard*, and his heirs; it was holden that *William* took an estate-tail by implication. *Walter v. Drew* 372

26. No one shall take by executory devise, who can take in any other way. *Ibid.* Page 374

Disability.

1. A person disabled by a statute cannot be enabled by the King. *Culliford v. Cardenell*, in Note 2
2. The law is the measure of the disability of Aliens, and the only rule to determine how far it extends. *Scott v. Schawurtz* 687

Discontinuance.

1. Fines levied of lands in antient demesne work a discontinuance. *Hunt v. Bourne* 93
2. The bargain and sale, or lease and release of a tenant in tail, does not work a discontinuance. *Macbell v. Clerk* 120
3. Where a defendant pleaded in abatement, and the plaintiff by his replication concluded with praying judgment and damages, it was adjudged a discontinuance. *Bodmyn v. Child* 189

Discovery.

1. A court of equity will not dismiss a bill for the discovery of matters which are properly triable at law. *Fens (Governors of) v. Hare* 694
2. A man is not obliged to discover what will subject him to a penalty. *East-India Company v. Naish* 346

Disseisor.

1. When any man is disseised, the disseisor has only the naked possession, because the disseisee may enter and evict him; but against all other persons the disseisor has a right, and in this respect only can be said to have the

the right of possession; for in respect to the disseisee he has no right at all. *Makepiece v. Fletcher*, in Note Page 461

Vide Descent, No. 2.

Distress.

1. A man who distrains for one cause may avow the taking for another. *Greenwell v. Burwell* 78
2. Where corn is taken in execution, and sold by the sheriff, and the vendee permits it after severance to lie on the ground, it is distrainable for rent. *Parflow v. Cripps* 204
3. The goods of a stranger, if found upon the premises, are distrainable for rent. *Ibid.* 205

Dower.

1. In dower, plea of lessee for years ought not to be received after plea and judgment for the demandant. *Green v. Roe* 581

Ejectment.

1. **I**N an ejectment against several, if one only confess, lease, entry, and ouster, and the others do not, how the verdict shall be. *Gree v. Rolls* 114
2. The heir of a copyhold, upon whom a copyhold descends, may maintain an ejectment before admittance. *King v. Osborn* 241
3. And the lessee may maintain an ejectment before the admittance of his lessor. *Ibid.* in Note *ibid.*

Emblements.

1. If a lessee at will determines his will, he shall not have the emblements. *Parflow v. Cripps* 204

Error.

1. From a court newly erected to proceed in a summary way, different from

that prescribed by the common law, no writ of error lies. *Greenwell v. Burwell* Page 80

2. Error for want of an original, is not completely assigned until the certificate is returned. *Sterling v. Tanner* 115

3. In error for want of an original, another original was allowed by the Court of Chancery, on an Affidavit that instructions were given to the Curfior for one, and that they were lost. *Levin v. —* 118

4. A writ of error supercedes an exigent. *Spinks v. Bird* 564

5. Error in fact is not assignable in the Exchequer Chamber. *Roe v. More* 597

6. Where a defendant, being an infant, appears by attorney, it is error. *Ibid.* *ibid.*

7. In what cases execution ought to be stayed upon a writ of error, where bail is not found. *Huddy v. Gifford* 321

8. A writ of error to the House of Lords must be transcribed in 14 days after the first day of the session in which such writ is returnable, unless it be upon a judgment given during the session, and then it must be in 14 days after such judgment given. *Barnes v. Orway* 420

Escape.

1. A gaoler is chargeable for an escape where the prison is broken open by rebels, and this in the case of prisoners for debt. *Lane v. Cotton* 104
2. An officer is chargeable for an escape of a person, where the action arises out of the jurisdiction of the court by whose process he was taken. *Higginson v. Sheif* 153
3. Where an officer may justify the detainer, he shall be liable for the escape of a person. *Ibid.* 155
4. In an action for an escape the defendant may plead double: *King v. Higgins* 422

Estates.

1. Where there is tenant in tail and remainder man in tail, and the latter grants his estate in the life of the former, the grant is void. It is otherwise where there is tenant in tail and reversioner in fee, and the latter grants his estate during the life of the former. *Badge v. Floyd* Page 66
2. A limitation to a man and his heirs, even in a deed, may be so explained, as to pass only an estate-tail. *Nottingham v. Jennings*, in Note 83
3. A copyhold estate surrendered to several, equally to be divided, and to their respective heirs, is not a joint estate, but an estate in common. *Fisher v. Wigg* 88
4. Tenant in tail covenants to stand seised to the use of himself for life with remainders, and afterwards suffers a recovery to other uses, the uses on the recovery were holden good. *Macbell v. Clerk* 119
5. If tenant in tail bargains and sells, or makes a lease and release to another in fee, the bargainee or releasee has a base fee not determined, nor determinable until the entry of the issue. *Ibid.* 120
6. And if tenant in tail levies a fine to the bargainee, the issue cannot avoid it. *Ibid.* *ibid.*
7. If tenant in tail makes a lease for years, and dies, it is only voidable. *Ibid.* *ibid.*
8. If tenant in tail make a lease to commence after his death, it is void. *Ibid.* 121
9. If tenant in tail covenant to stand seised to the use of one and his heirs, this passes a base fee to the *Cestuy que use*. *Ibid.* *ibid.*
10. Where tenant in tail covenants to stand seised to the use of himself for life, remainder to another, the remainder is void. *Ibid.* *ibid.*
11. A settlement by the heir on the part of the mother, to the use of himself in fee, shall be to the old use. *Abbot v. Burton* 160
12. A devise with the following words, *Whatever else I have in the world*, will pass an estate in fee. *Hopewell v. Ackland* Page 164
13. A devise to one indefinitely, without limiting any estate to him, gives him only an estate for life. *Ibid.* 167
14. A devise of all his estate in such lands passes a fee. *Ibid.* *ibid.*
15. So a devise of all his inheritances. *Ibid.* *ibid.*
16. Estate imports the interest which a man has in lands. *Ibid* in Note *ibid.*
17. The word *Hereditament* implies a fee. *Ibid.* in Note *ibid.*
18. The heir shall never be disinherited by an estate given by implication in a will, if such implication be only constructive and possible, but not necessary. *Ibid.* 168
19. The words *rest and residue of his estate* are sufficient to give the devisee not only the lands not before disposed of, but also the estate not disposed of in land devised to another. *Ibid.* 169
20. And the words *whatsoever else he hath in the world* are tantamount. *Ibid.* *ibid.*
21. The power of making a greater warrants a less estate. *Dighton v. Tomlinson* 196
22. Where baron and feme are tenants in tail, to them and the heirs of their bodies, and the baron levies a fine and dies, the estate revives as to the wife, who shall be tenant in tail, and then ceases as to the issue, who shall be barred by the father's fine. *Thornby v. Fleetwood* 217
23. An estate may be in abeyance for a time. *Ibid.* *ibid.*
24. An estate may go to him in reversion, and afterwards return, as where tenant in tail dies without issue born, and his wife is *enfeint*, if a son be afterwards born, he shall take by descent. *Ibid.* *ibid.*
25. There cannot be a remainder, unless a particular estate is created at the same time upon which it is expectant. *Right v. Hammond* 232

26. A limitation to one to take and enjoy the profits of an estate during his life, and after his decease to the heir male of his body, would make an estate-tail, where nothing appears which explains the testator's intent to the contrary, otherwise not. *White v. Collins* Page 289

Evidence.

1. Evidence of infancy cannot be given in avoidance of a deed. *Thompson v. Leach* 47
2. An acknowledgment of a debt is evidence only of a promise to pay it. *Heylin v. Hastings* 55
3. Demand and refusal is evidence only of a conversion. *Ibid.* *ibid.*
4. Every thing may be produced in evidence upon *Non Devastavit* upon the *Scire Fieri* enquiry, which might have been given upon a *Plene Administravit*. *Rock v. Layton*, in Note 88
5. A probate is conclusive evidence of a will. *Anon.* 150
6. In an action founded upon an injury, every thing which shews that the defendant did what he lawfully might do, may be given in evidence upon Not Guilty. *Anon.* 273
7. In an action for words, upon Not Guilty pleaded, whether the defendant can be admitted to give evidence of the truth of the words spoken (when they import a felony) in mitigation of damages. *Smith v. Richardson* 552
8. The rule upon this subject. *Ibid.* in Note 553
9. Where there is a single witness against the defendant's oath, this is not sufficient evidence for a decree. *Speed v. Martin* 587
10. The rule upon this subject. *Ibid.* in Note. 589
11. A will shall not be read on proof of a witness's hand, unless there be positive proof that he is dead. *Bishop v. Burton* 614

Execution.

1. The first *Fi. Fa.* delivered to the sheriff should be first executed; but if he executes the last first, the execution is good, and the party must have his remedy against him. *Smalcomb v. Owen* Page 34
2. The moveables of a stranger, levant and couchant, may be taken on a *Levari Facias*. *Britton v. Cole* 51
3. For an account of the different writs of execution, see. *Ibid.* 52
4. A writ of execution may bear *teste* the first day of the term of which the judgment is entered. *Parsons v. Gill.* 117
5. Tenant in dower shall not have execution of a reversion after a term. *Bodmyn v. Child* 185
6. Where corn is taken in execution and sold by the sheriff, and the vendee permits it after severance to lie on the ground, it is distrainable for rent. *Parflow v. Cripps* 204
7. If a trustee has conveyed lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution. *Hunt v. Coles* 226
8. Notice of executing a writ of enquiry ought to ascertain time and place, where it is to be executed. *Le Marque v. Newman* 551
2. If *A. B.* and *C.* are partners, and judgment and execution are sued against *A.*, only his share of the goods can be sold. *King v. Manning* 619
10. Where a *Scire Facias* issued against *B.* after the seizure of all the partnership goods upon a judgment and execution against *A.* and the sheriff returned *nulla bona*, it was holden to be a false return. *Ibid.* *ibid.*
11. Whether a defendant after a decree against him shall, before execution sued, by alienation prevent the plaintiff from taking his lands upon a sequestration. *Cook v. Cook* 712
12. Upon a writ of error brought after judgment in an action upon a bond with

with a condition for the payment of money only, execution ought not to be stayed, if bail be not found.

Huddy v. Gifford Page 321

13. Upon a writ of enquiry executed after judgment by default in prohibition, the plaintiff shall have his costs. *Bettison v. Savage* 335

Executor.

1. An executor from his name is but a trustee. *Petit v. Smith* in note 3
2. Is not compellable by the Spiritual Court to make distribution according to the stat. 22 & 23 Car. 2. c. 10. *Ibid.* *ibid.*
3. If A. has a term as executor and purchases the reversion, it is no extinguishment because he possesses them in different rights. *Gage v. Adon* 69
4. If an executor hath assets to the value of 100*l.* and two actions are brought against him for 100*l.* a-piece and judgment in both, he shall be charged to each judgment with assets of 100*l.* and shall be compelled to the payment of 200*l.* without possibility of avoiding it. *Rock v. Layton* 88
5. An executor may traverse the devise of an executorship to another. *Anon.* 150
6. Payment to an executor having a probate, if the probate is afterwards repealed, does not discharge the party against the legal executor. *Ibid.* *ibid.*
7. A probate is conclusive evidence of a will. *Ibid.* *ibid.*
8. An executor shall pay costs where he brings an action as executor which he might have brought in his own name. *Hole v. King* 162
9. If a patron dies after his church becomes void, and before he hath presented, the avoidance is a chattel, and goes to his executor. *Fitzherbert v. Reeves* 176
10. Where an executor delivers a legacy upon condition, the condition is void. *Dighton v. Tomlinson* 196
11. If an executor pleads bonds and judgments, and no assets *ultra* the

judgments, and the plaintiff replies that the bonds were fraudulent, and it is found against him, he cannot have judgment, though the assets are found to be *ultra* the judgments pleaded. *Chambers v. Shaw* Page 206

12. If the King's debtor dies, he may have his remedy against his executor at any time. *Att. Gen. v. White* 433

13. In no case of penalty, forfeiture, or wrong committed does an action lie against the executor of the offender. *Ibid.* 434

14. No action lies against executors on the stat. 2 & 3 Edw. 6. cap. 13. for not setting out tithes. *Ibid.* *ibid.*

15. Neither is the executor of the parson entitled to the forfeiture given by that statute. *Ibid.* in note *ibid.*

16. Debt lies not against executors where the testator might have waged his law. *Ibid.* 435

17. Nor upon an award made upon a submission by the testator to a reference, though the award be in writing. *Ibid.* *ibid.*

18. Where money grows due upon the default or misdemeanour of the testator, if reduced to a certainty by matter of record, an action lies against an executor for it. *Ibid.* 436

19. Where executors are liable in the case of the Crown, and not in the case of common persons. *Ibid.* 437

20. An executor cannot wage his law against the Crown. *Ibid.* *ibid.*

21. Where an interest is actually vested in any one, it will go to his executors; otherwise not. *Hutchins v. Foy* 716

Extent. Vide King, No. 11.

Fines.

1. **A** Fine cannot be averred to other uses than those which are expressed in an indenture *precedent* to declare the uses; otherwise if the indenture be *subsequent*. *Jones v. Maseley* 30

2. Fines may be levied in courts of antient demefne. *Hunt v. Bourne* Page 93
3. Such fines are no bar to the issue in tail, but they work a discontinuance. *Ibid.* *ibid.*
4. A writ of covenant for a fine is a real action. *Ibid.* 124
5. A fine levied of land in antient demefne in the Court of Common Pleas makes it a frank fee and the lord has his writ of difceit to reverse it. *Ibid.* 126
6. A fine by one out of possession paffes nothing to the conufee, and extinguifhes the right of the conufor. *Ibid.* 128
7. Where baron and feme are tenants in tail, to them and the heirs of their bodies, and the baron levies a fine and dies, the estate revives as to the wife, who fhall be tenant in tail, and then ceafes as to the issue, who fhall be barred by the father's fine. *Thornby v. Fleetwood* 217
8. A Court of Equity may order a feme covert who is an infant, being heir or trustee to levy a fine. *Anon.* 615

Frauds.

1. A promise to pay the debt of a third perfon, who is himfelf responsible for the debt, muft be in writing, being within the ftatute of frauds. *Barker v. Lamplugh* 142
2. Where a will is well executed within the ftatute of frauds. *Peate v. Ogely* 197
3. Whether a contract for ten fhares of ftock be within the ftatute of frauds. *Pickering v. Appleby* 354

Game.

1. A Conviction *super præmiſſis* for three penalties of five pounds each, for killing three hares, where it appears that it was done at the ſame time, is bad, for the ftatute does not give five pounds for every hare, it being all but one offence. *Marriott v. Shaw* 274

2. In an action of debt upon the ſtat. 5 Ann. c. 14. for keeping and uſing a dog to kill the game, it is neceſſary to ſhew what ſort of dog it was. *Reaſon v. Liſle* Page 576

Gaming.

1. All ſecurities given by a third perſon for money loſt at play are equally void with thoſe given by the party himſelf. *Huffey v. Jacob.* 5
2. An agreement to run four heats at a horſe race for 40*l.* each heat is void by the ſtat. 16 Car. 2. *Ibid.* 6

Vide Bills of Exchange. No. 2, 3, 4.

General Iſſue. Vide Pleadings.

Guardian.

1. A father continues ſuch to his ſon till he arrives at the age of twenty-one years, in reſpect to his perſon, but not to his lands. *King v. Thorp* in note 28

Heir.

1. WORDS diſinheriting an heir muſt be plain, clear, and not ambiguous. *Hopewell v. Ackland* 168
2. The heir ſhall never be diſinherited by an eſtate given by implication in a will, if ſuch implication be only conſtructive and poſſible, but not neceſſary. *Ibid.* *ibid.*
3. The word *Heir* is *women collectivum*. *White v. Collins* 291
4. No one ſhall take againſt the heir without an expreſs deviſe to him. *Fowler v. Blackwell* 353

Hereſy.

1. In a libel for Hereſy, the refusal of a citation by the Dean of the Arches, was holden a good cauſe of appeal to the Delegates. *Felling v. Whiſton* 199

Homicide.

1. All Homicide before the stat. of *Maulbridge* was murder. Homicide *per infortunium*, Homicide *se defendendo* was murder. *King v. Keate* Page 14
2. Without malice is manslaughter. *Ibid.* ibid.
3. Words are not a sufficient provocation to convert murder into manslaughter. *Ibid.* 15
4. If *A.* illegally impresses *B.*, and *C.* in endeavouring to rescue him kills *A.* it is only manslaughter. *Quare. Ibid.* ibid.

Hue and Cry.

1. In an action upon the stat. 13 *Edw.* 1. *ft.* 2. *c.* 9. for a robbery, it ought to appear that the plaintiff had the whole property in the money of which the robbery was committed; or otherwise if intire damages be given, it will be bad *in toto.* *Vaisey v. Whiston* 327
2. Where a man delivers money to a servant to carry, and he is robbed of it, the servant may maintain an action against the hundred, and declare that he was possessed *ut de bonis propriis.* The master also may bring an action if he pleases. *Ibid.* in note 328
3. An action lies upon the stat. 13 *Edw.* 1. against the hundred for a robbery committed on a *Sunday*, notwithstanding the stat. 29 *Car.* 2. *c.* 7. if it appears that the person robbed was going only to his parish church. *Talbmaker v. Edmouton* (Hund. of) 345
4. For the manner of raising the Hue and Cry. *Ibid.* in note 346

Hundred. Vide Hue and Cry.

Immaterial Issue.

1. **I**N an Immaterial Issue the defendant shall plead again, though after a verdict for the plaintiff. *Anon.* 148
2. Where the plaintiff joins an Immaterial Issue, and thereby delays himself,

he is not entitled to costs. *Craven v. Hanley* in note 3. Page 550

Infancy.

1. Evidence of Infancy cannot be given in avoidance of a deed. *Thompson v. Leach* 47

Information.

1. Shall go against the Mayor, where persons intituled to their freedom and demanding admittance, are refused. *King v. Osborn* 240

Inn-Keeper.

1. Is not liable for goods left at the inn by a stranger. *Lane v. Cotton* 104

Insurance.

1. When insurance is interest or no interest, the plaintiff has no occasion to prove his interest, for the defendant cannot controvert that. *Depaba v. Ludlow* 360

Joint Tenants. Vide Tenants in Common.

Judge.

1. A Judge is not answerable for any act he may do as Judge. *Groenvelt v. Burwell* 79
2. A fine imposed by a Judge of a Court is not traversable as an amendment is. *Ibid.* 81

Judgments.

1. The judgement which is given upon a *Petit Cape*, being awarded instead of a *Grand Cape*, will be set aside as irregular. *Harding v. Harding* 148
2. Judgment shall not be arrested after a verdict where intire damages are given, though part of the time was to come at the time of trial. *Talden v. Hubburb* 231
3. Judgment had been entered in case, and on discovery that it had been illegally obtained, it was vacated. *Phillips v. Fowler* 527

Jury.

1. A jury is not finable for giving a verdict against evidence. *Groenvelt v. Burwell* Page 81
2. If the jury is discharged at the assizes for a view, there is no need of a *Venire Facias de novo*. *Anon.* 248
3. A verdict was set aside where the jury cast lots how they should give it. *Phillips v. Fowler* 525
4. Which conduct was a great misdemeanour in the jury. *Ibid.* in note 2. 527
5. A verdict was holden void, because the jury examined the witnesses apart. *Ibid.* *ibid.*
6. It shall be left to a jury to determine, merely from circumstances without any positive proof, whether the witnesses to a will being all dead set their names in the presence of the testator. *Hinds v. James* 531
7. Where a new trial shall be granted for a misbehaviour in one of the jury. *Wynn v. Bangor* 601

Justices of the Peace.

1. Ought to make restitution immediately upon a conviction of a forcible entry. *King v. Harris* 61
2. An order of justices to remove a man and his family is ill on account of uncertainty. *King v. —* 86
3. A *Certiorari* lies to remove an order of justices of the peace upon a private Act of Parliament. *King v. —* *ibid.*

King.

1. **T**HE King in right of his prerogative may revoke his presentation. *Fitzherbert v. Reeves* 176
2. In *Quare Impedit* if the plaintiff be outlawed pending the writ, that outlawry gives the King the title. *Ibid.* 178

3. But on reverting the outlawry the plaintiff shall have execution of his judgment, and the King's incumbent shall be removed. *Ibid.* in note Page 179
4. When an Act of Parliament gives a forfeiture generally, the law determines that the King shall have it. *Thornby v. Fleetwood* 211
5. If the King's debtor dies, he may pursue his remedy against his executor at any time. *Att. Gen. v. White* 433
6. In what instances the King has a remedy against executors, which is denied to common persons. *Ibid.* 437
7. An executor cannot wage his law against the Crown. *Ibid.* *ibid.*
8. If one joint-tenant be indebted to the King, but a moiety shall be extended; and if he die before any extent, no extent shall be made on the land in the hands of the survivor. *King v. Manning* 619
9. The King, who is *Persona Sacra*, being capable of tithes in perannuity, is capable of prescribing to be discharged from the payment of them. *Wallis v. Pain* 654
10. The King's patentee, being a lay person, cannot so prescribe. *Ibid.* 656
11. An extent shall go for the King's money against any one who imbezils it, but not where money due to the King is paid, and his security cancelled before a bond given by a deputy to his principal for ballance in his hands. *King v. Clark* 388

Leases. Vide Powers.**Legacy.**

1. **W**HERE an executor delivers a legacy upon condition the condition is void. *Dighton v. Tomlinson* 196
2. A diversity is taken between a bequest which is to take effect at a future time, and where the payment is to

- to be made at a future time. *Hutchins v. Foy* in note 2 Page 722
3. In case an husband dies before a legacy becomes payable to his wife, it is in the nature of a *Chose in Action*, which will survive to the wife. *Brotherow v. Hood* 725
4. A condition precedent, viz. marriage with the consent of the mother or others, annexed to a portion or legacy, is not to be dispensed with in a Court of Equity, though in the case of daughter's fortunes. *Harvey v. Aston* 726
5. Where a legacy is given in consideration that a daughter should never marry, the condition is void. *Ibid.* 729
6. Where a legacy is given on consideration that the legatee should not marry without consent, and there is no devise over, the condition is void. *Ibid.* *ibid.*
7. Otherwise where there is a devise over; and the reason for it. *Ibid.* 730
8. The Ecclesiastical Court makes no difference whether there is a devise over or not, but in both cases holds the condition void. *Ibid.* *ibid.*

Better Notice.

1. A decree served on a Peer needs no Letter Missive. *MacKenzie v. Powis* 675

Exebant and Couchant.

1. The cattle of a stranger Levant and Couchant thereon are issues of the land, and as such may be sold under a *Le. ari Facias*. *Britten v. Cole* 52

Exebari facias. Vide Execution.

Levitical Degrees.

1. A marriage with an illegitimate relation within the Levitical degrees is illegal. *Haines v. Jefferys* 2

2. A marriage with the wife's sister's daughter was holden to be within the Levitical degrees. *Ellerton v. Gastrell* Page 318

Limitations.

1. A conditional promise will avoid the statute of limitations. *Heylin v. Hastings* 54
2. An acknowledgement of a debt after the commencement of the action takes it out of the statute. *Ibid.* in note 56
3. The statute does not destroy the debt, it only takes away the remedy. *Ibid.* in note *ibid.*
4. A limitation which passes nothing may explain the intention of the testator respecting other clauses. *Nottingham v. Jennings* 83
5. The entry of *Cestui que trust* is sufficient to avoid the statute. *Gree v. Rolls* in note 114
6. *Quære* If the statute of limitations extends to suits in the Admiralty Court for seamen's wages? *Ewer v. Jones* 137
7. The statute of limitations extends not to a trust. *Skirne v. Meyrick* 709
8. The statute of limitations is as well a bar in equity as at law. *Ibid.* 710
9. This stat. extends not to accounts current. *Ibid.* *ibid.*
10. Where an executor, administrator, or trustee for an infant, neglects to sue within six years, the statute shall bind the infant. *Ibid.* in note 711

Esberg.

1. If a man approaches as near as he can to the lands, this amounts to a livery. *Austin v. Osborn* 246

London.

1. A suit in the arches against any in the diocese of London is good. *Quære.* *Pelling v. Whycon* 202
2. By

2. By the custom of *London* every citizen upon an antient foundation may build his house as high as he pleases.

Anon. Page 273

3. By the custom of *London* a daughter loses her orphanage share of her father's personal estate, if she marries without his consent; unless he be reconciled to it before his death. *Harvey v. Aston* 749

Manumissus.

1. DOES not lie to the Spiritual Court after administration granted. *Blackborough v. Davis* 96

Marriage.

1. A marriage with an illegitimate relation within the *Levitical* degrees is illegal. *Haines v. Jeffreys* 2
2. Marriage extinguishes all contracts for debts due *in futuro*, in *presenti*, or upon a contingency which may become due during the coverture; otherwise where the debt cannot become due during the coverture. *Gage v. Aston* 68
3. A marriage with the wife's sister's daughter was holden to be within the *Levitical* degrees; so a prohibition was denied to the Spiritual Court, where a libel for that purpose was exhibited. *Ellerton v. Gasrell* 318
4. Marriage articles shall be carried strictly into execution. *West v. Eri-ley* 412

Militia.

1. A person is chargeable to the militia levy, though it was not exercised. *Aibel v. —* 158

Modus. Vide Tithe.

Mortgage.

1. *A.* conveys lands to *B.* and his heirs by lease and release, and by a de-

feazance bearing date with the release agrees that if he pays 1000*l.* borrowed of *B.* within a year, that *B.* should re-convey to him; but if he failed to pay the money within the year, then *B.* should mortgage or absolutely sell the same lands free from redemption. The money not being paid at the time, *B.* agreed to convey the estate to *C.* and in the agreement and conveyances an exception was made, and the defeazance was mentioned, and a question arising whether *C.* had an absolute estate, the Court determined that he had purchased an estate subject to a redemption by *A.* *Craft v. Powell* Page 603

2. A mortgage by a Popish heir may be redeemed by the next Protestant kin. *Jones v. Meredith* 661
3. One who claims under a voluntary conveyance may redeem a mortgage. *Ibid.* 669
4. A mortgagee shall not be allowed to present to a living, which becomes vacant, because nothing can be taken for it, but shall be looked upon as a trustee for the mortgagor or his grantee, and shall present such person as they shall name. *Gally v. Selby* 343
5. A mortgagee may redeem his mortgage, even though he has covenanted, or taken an oath not to redeem. *E. Ind. Company v. Atkins* 349

Nabigation.

1. IN an information upon the statute 12 *Car. 2. c. 18.* it was determined that a ship which was manned by mariners resident for some years in *Russia*, but who were not natives of the country, was exempt from the penalties of the act. *Siet v. Schwartz* 677

Negroes.

1. *Quære*, Whether trover lies for a Negroe. *Pickering v. Appleby* 355

Poli Profcqui.

1. May be granted upon an indictment against a surgeon for refusing to be a constable. *King v. Pond* Page 312

Non-Claim.

1. Where the right of entry shall be tolled by descent and non-claim.
Makepiece v. Fletcher 457

Don-Quit.

1. Plaintiff ought to pay the costs of one non-suit only, where a *latitat* was awarded against four defendants, though they appeared severally by different attorneys, where the non-suit was for not declaring against them in two terms. *Anon.* 74
2. Where the plaintiff hath been nonsuited for a defect in the declaration, the defendant shall be admitted to common bail in a new action brought. *Quere. Almden v. Davila* 94

Notice.

1. Notice of executing a writ of inquiry ought to ascertain time and place where it is to be executed. *Le Marque v. Newman* 551
2. Notice of refusal ought in all cases to be given to the patron. *King v. Herford* (Bishop of) in note 360

Dufane.

1. An action lieth not for a general
nuſance, where a particular damage
to the plaintiff is not laid. *Iveſon v.*
Mein 58
2. The reaſon is to avoid a multiplicity
of ſuits, and becauſe the King is en-
trufteſt with the remedy. *Ibid.* 59

Offices.

- i. **A** Security by a deputy to account for half the profits of an office to the principal, and to retain the other half to himself is not a sale within the stat. 5 & 6 Edw. 6. c. 16. *Culliford v. Cardonell* Page 1
2. The stat. 5 & 6 Edw. 6. c. 16. respecting the sale of offices extends not to Jamaica or to the Colonies. *Culliford v. Cardonell* in note 2

Outlaborv:

1. When pleaded in abatement, must be pleaded *sub peds sigilli*. *Moore v.* 307
2. Otherwise when pleaded in bar, or if the outlawry is in the same Court: *Ibid.* in note *ibid.*

39ap108.

- i. **A** Recovery suffered by a person bred a Papist; and instructed in a seminary or college of Jesuits beyond sea in the Popish religion was holden good, notwithstanding the statutes 1 Jac. 1. c. 4. s. 6. 3 Jac. 1. c. 5. and 3 Car. 1. c. 2. *Thornby v. Fleetwood* 207
2. A Papist may devise his estate to be sold in order to pay money which he owes to other Papists, notwithstanding the stat. vi & 12 Will. 3. c. 4. *Matlem v. Binglei* 570
3. A mortgage by a Popish heir may be redeemed by the next Protestant kin. *Jones v. Meredith* 661

Partners:

1. If *A. B. and C.* are partners; and judgment and execution is sued against *A.*; only his share of the goods can be sold. *King v. Manning* 619
2. Where a *Scire Facias* issued against *B.* after the seizure of all the partnership goods upon a judgment and execution

execution against *A.* and the sheriff returned *Nulla Bona*, it was holden a false return. *Ibid.* Page 619

Patron.

1. If a Patron dies after his church becomes void, and before he hath presented, the avoidance is a chattel and goes to his executor. *Fitzberbert v. Reeves* 176
2. A patron may vary but cannot revoke his presentation. *Ibid.* *ibid.*
3. Notice of refusal ought in all cases to be given to the patron. *King v. Herford* (Bishop of) in note 360

Payment.

1. If a servant, who is sent to receive money, accepts a goldsmith's note instead of it, such acceptance does not bind the master. *Ward v. Evans* 138
2. Paper is no payment where there was an original and precedent debt, for it is intended to be taken upon this condition (*viz.*) that the money be paid in a convenient time. *Ibid.* in note *ibid.*

Perjury.

1. An information for Perjury shall not be supplied by an *Innuendo*. *King v. Gripe* 43
2. If a man gives evidence to the credit of a witness, though this be not the issue, yet it is perjury. *Ibid.* in note *ibid.*

Pleadings.

1. In many cases a defendant has it in his election to plead a matter specially, or give it in evidence upon the general issue. *Hussy v. Jacob* 4
2. In an action against a stranger the plaintiff need not shew title in himself. *Stroud v. Birt* 7

3. Title must be shewn where the action is brought against an owner of the soil. *Ibid.* Page 7
4. Where a defendant in his plea has confessed the action, the judgment shall be upon his confession, and not upon his bad plea. *Jones v. Bodingham* 11
5. And the plaintiff shall have judgment, even though a verdict is found for the defendant. *Ibid.* in note 8
6. Concord is not well pleaded without satisfaction. *Ibid.* 10
7. Payment without acquittance is not a good plea to debt on bill. *Ibid.* *ibid.*
8. Such a plea is good after verdict, though bad on demurrer. *Ibid.* in note *ibid.*
9. Entry without expulsion is a void plea in bar of rent. *Ibid.* 11
10. Where an action lies at common law the words *contra formam statuti* shall be rejected as surplusage. *Bennett v. Thalbois* 26
11. A termor for years cannot declare upon a *Que estate*. *Dorn v. Galsford* 44
12. If a man has matter of bar to plead, and slips his opportunity of pleading it, he loses the benefit of it for ever. *Rock v. Layton* in note 88
13. If a man covenants to do several things, and his declaration contains a general averment of performance, this is aided by the appearance and plea of the defendant. *Thorpe v. Thorpe* 99
14. An instrument of composition with creditors need not be pleaded with a *proferit in curiam*. *Feltham v. Cudworth* 113
15. Where a person agrees to do a thing, he must shew that he has done all in his power to perform it. *Lancashire v. Kellingworth* 117
16. *Cepit in alio loco* is to be considered as a plea in bar, and not in abatement. *Smith v. Walgrave* in note 122
17. In an action for a double return it is sufficient for the plaintiff to alledge that he was duly elected, he need not state

- state any thing to shew that his election was regular. *Hale v. Owen* Page 133
18. If the statute of limitations extends to suits in the Admiralty Court for seamen's wages, a plea that it appears by the libel that the cause of action did not accrue within six years is bad. The defendant should state immediately that the cause of action did not accrue within six years. *Ewer v. Jones* 137
19. In an action upon a joint obligation it must appear that all executed it; or otherwise it will be bad. *Fitzgerald v. Cragg* 139
20. In a release pleaded, no place was alledged, and held a material omission on a general demurrer. *Barker v. Palmer* 141
21. Where a submission is pleaded, and no place is shewn, it is bad. *Ibid. ibid.*
22. If a plea be to an action brought by one as administrator, that *A.* made an executor, the defendant ought to traverse that *A.* died intestate. *London v. Bessingham* 156
23. A plea of the performance of a will generally is bad. *Harvey v. Richardson* 161
24. In an action against a bankrupt for a debt due before he became a bankrupt, he may plead that the cause of action accrued before his bankruptcy; but he must plead it *Vigore Statuti*. *Pyson v. —* 205
25. If an executor pleads bonds and judgments, and no assets *ultra* the judgments, and the plaintiff replies that the bonds were fraudulent, and it is found against him, he cannot have judgment, though the assets are found to be *ultra* the judgments pleaded. *Chambers v. Shaw* 206
26. There must be a particular act shewn by which the plaintiff is interrupted, otherwise the breach of a condition for quiet enjoyment is not well assigned. *Anon.* 228
27. When a person is charged as bailiff he cannot plead that at another time he was charged as receiver. *Walker v. Holyday* in note 2 272
28. In an action founded on an injury, every thing which shews that the defendant did what he lawfully might do, may be given in evidence upon not guilty pleaded. *Anon.* Page 273
29. In an action for an escape, the defendant pleads that the prisoner escaped and returned before the action brought, without his knowledge, and was in execution for the damages on the said judgment; and it was holden well, being tantamount to a retaking on a fresh pursuit. *Chambers v. Gambier* 554
30. In justifying under the process of an Inferior Court, it is necessary to shew that the precept levied was within the jurisdiction of the Court. *Moravia v. Sloper* 574
31. Where interest is in land, or claimed out of it, the plaintiff cannot reply *de injuriâ suâ propriâ*, but ought to traverse the right. *Cockeral v. Armstrong* 582
32. The sheriff may justify by grant of a replevin, without shewing the property of the goods to be in the plaintiff in replevin. *Milles v. Davies* 590
33. Upon *non est factum* pleaded to a bail-bond, the defendant admits all other matters against him, and depends upon that for his defence. *Bishop v. Brooks* 303
34. An argumentative plea is not good. *Wall v. Fulwood* 330
35. But shall be aided by verdict or on a general demurrer. *Ibid.* in note 332
36. A plea of the stat. 13 *Eliz. c. 20.* for non-residence was allowed to be good when pleaded to a bill brought by a lessee for tithes. *Bokenham v. Bentsfield* 392

Poor's Rates:

1. Whether Chambers in an Inn of Chancery are within the words or intent of the stat. 43 *Eliz. c. 2.* ratable to the poor. *Mexon v. Horsenail* 5
- B b 3

Post Master General.

1. Is not liable for Exchequer bills lost by the negligence of the receiver out of a letter delivered at the post-office. *Luce v. Cotton* Page 100
2. Is not liable for any default but his own. *Ibid.* in note *ibid.*
3. Before the stat. 12 Car. 2. c. 35. was liable for any miscarriage. *Ibid.* 102
4. Is liable for any fault of his own. *Ibid.* *ibid.*
5. Is not like a common carrier. *Ibid.* in note 105

Potatoes.

1. Are in their nature a small tithe, and the sowing them in great quantities will make no alteration. *Wallis v. Pain* in note 639

Powers.

1. To make leases when well pursued. *Winter v. Loveday* 36
2. A lease in reversion is that which has its commencement at a future day. *Ibid.* 38
3. General power to make leases how to be construed. *Ibid.* *ibid.*
4. Under a power to make leases in possession or reversion, a man may make either, but not both. *Ibid.* 39
5. If a man has a power reserved to him of making leases of two things, and a qualification is annexed to the power, which cannot extend to one of these things, he may make a lease of that thing, without regarding the qualification. *Ibid.* 41
6. Every power shall be taken with such a restriction that the estate shall not be destroyed by it. *Ibid.* 42
7. Whether a lease for years by tenant for life, in pursuance of a particular power, shall be good against him who claims in remainder. *Bayley v. Warburton* 404

8. A power given to a single woman, may if she marry, be executed by her husband and her. *Ibid.* Page 496
9. A lease by tenant in tail is not good against him in reversion or remainder. *Ibid.* 497
10. Where a power is annexed to the estate of one in possession to make leases, without saying in reversion, he can make a lease in possession only, and not a lease in reversion to commence *in futuro*. *Coventry v. Coventry* 315
11. So if the power be to make leases for one, two or three lives, he cannot make a lease for a life not *in esse*. *Ibid.* *ibid.*
12. So where a man has power to make a lease pursuant to a power, he shall not make a second lease to commence pursuant to his power. *Ibid.* *ibid.*
13. A lease to commence from the death of a prior lessee for life will be good. *Ibid.* 317

Præfice.

1. It is sufficient to insert in the copy of the issue, by way of replication to a plea *Nul tiel record, quod habetur tale recordum*, though not under a Counsel's hand. *Newberry v. Stradwick* 533
2. Render of a prisoner by his bail is not compleat till the fees are paid. *Huxley v. Clendon* 554
3. A motion to plead double was denied, after a judgment which had been regularly obtained was set aside on payment of costs. *Leaver v. Witches* 561
4. Where a plea of justification was absolutely necessary to try the merits, and the plaintiff had not been delayed of a trial, the Court have admitted the defendant to make such defence, though the judgment set aside was regular. *Ibid.* in note *ibid.*
5. An administrator was permitted, after a regular judgment was set aside upon payment of costs, to plead *plene administravit* generally, which was looked

looked upon as the general issue.
Ibid. in note Page 561

6. The county being in the margin will supply the want of it in the declaration. *Sbelley v. Wright* 562
7. The sheriff's deputy is to be entered on record. *Bury v. Rabutia* 566
8. A decree served on a Peer needs no letter missive. *Mackenzie v. Powis* 675
9. In covenant, the plaintiff by his replication assigns several breaches, to which the defendant does not rejoin; though the plaintiff cannot waive the breaches, (being entered on the roll) yet he may take judgment for want of the rejoinder. *Walker v. Priestly* 376

Prescription.

1. No one can maintain an action for nonfeance of a thing contrary to common right without alledging a prescription. *Wagstaff v. Rider* 341
2. When a prescription for a seat in a church is found by the verdict, the repairing, which is only a circumstance requisite to support the prescription, is of necessity included. *Stedman v. Hay* 366

Presentation. Vide **Patron.** **Quare Impebit.**

Privilege.

1. How far privilege of Parliament after dissolution shall be extended. *Pitt's Case* 444

Process.

1. A Process to take the body, in the first instance, if found, if not, to attach him by his goods, is a void process, and custom will not make it good. *Noxon v. Lilly* 537
2. An attachment returnable before the full term, if after the Effoin day, which is strictly the first day of the term, was holden good. *King v. Harris* 547

3. Process to be used when a Peer is defendant. *Mackenzie v. Powis* in note 1. Page 675

Prohibition.

1. Whether it shall be granted to the Spiritual Court in a suit for fees there. *Quare. Johnson v. Lee* 18
2. Shall not go where scandalous words are spoken of the function of a spiritual person. *Anon.* 25
3. Shall go to the Admiralty in a suit for the wages of a master of a ship. *Day v. Snelgrove* 74
4. Where a suggestion for a prohibition is not proved in six months, the party shall have a consultation without delay. *Anon.* 147
5. Words which do not directly charge the party with being a whore, are not such whereon the jurisdiction of the Spiritual Court ought to be disallowed. *Steward v. Allen* 235
6. If a cause in an Inferior Court be alledged *infra jurisdiction' cur'*, though it be out of the jurisdiction, if the defendant does not plead to the jurisdiction, he shall not afterwards have a prohibition. *Marriott v. Shaw* 278
7. Prohibition shall be granted to the Spiritual Court where a libel is for words spoken of a clergyman, which are actionable at common law. *Hall v. Downes* 309
8. In what cases of defamation prohibitions are not granted to the Spiritual Court. *Ibid.* in note 2 311
9. A marriage with the wife's sister's daughter was holden to be within the *Levitical* degrees; so a prohibition was denied to the Spiritual Court, where a libel for that purpose was exhibited. *Ellerton v. Gafrell* 318
10. Upon a writ of enquiry executed after judgment by default in prohibition, plaintiff shall have costs. *Bettison v. Savage* 335

Promissory Notes. Vide **Bills of Exchange.**

Property.

1. A man has a property in animals which are *Feræ Naturæ* found on his lands *Ratione Loci*. *Sutton v. Moody*
Page 33

Quare Impedit.

1. **W**HERE the patron had presented one incumbent, and the University presented another after, the Bishop has his election to take one presentee or the other; and if the Bishop admits and institutes the presentee of the University, the patron cannot maintain a *Quare Impedit*, because there was no disturbance. *Fitzherbert v. Reeves* 169
2. But if the Bishop had instituted the presentee of the patron, *Quare* in that case, whether a *Quare Impedit* would have been maintainable. *Ibid. ibid.*
3. In *Quare Impedit* if the plaintiff be outlawed pending the writ, that outlawry gives the King the title. *Ibid.* 178
4. But on reversing the outlawry, the plaintiff shall have execution of his judgment, and the King's incumbent shall be removed. *Ibid.* in note 179
5. In *Quare Impedit* the Bishop pleaded that he claimed nothing but as Ordinary, and it was holden bad, for want of alledging notice of the refusal, though in a case where the Crown presented. *King v. Hereford* (Bishop of) 358

Que Estate.

1. A Termor for years cannot declare upon a *Que Estate*. *Durn v. Gressford* 44

Qui Tam Actions.

1. In an action *Qui Tam* on a statute, it is sufficient to say that a person is not qualified, without shewing that he

had not 100*l.* a year, or any other estate which makes a qualification. It is otherwise in a conviction. *Blaet v. Needs* Page 522

Receiver. Vide Bailiff.

Rectory.

1. **T**HE word *tenement*, mentioned in the stat. 9 & 10 Will. 3. for the workhouse corporation of *Colchester*, extends to a Rectory. *Powell v. Bull* 265

Remainder.

1. A future right of entry will not support a contingent remainder; a present right will. *Thompson v. Leach* 46
2. If the tenant for life enters for breach of the condition before the contingency happens, the contingent remainder may vest. *Ibid.* 46
3. A remainder limited to take effect if and when former limitations cease is not contingent but vested. *Badge v. Floyd* 62
4. Where a tenant in tail covenants to stand seised to the use of himself for life, remainder to another, the remainder is void. *Machell v. Clerk* 121
5. There cannot be a remainder unless a particular estate is created at the same time upon which it is expectant. *Right v. Hammond* 232
6. The definition of a remainder. *Ibid.* in note 234

Removal.

1. An order of Removal not appealed from is conclusive to all the world. *King v. Chalbury* 71
2. An order of Justices for the removal of a man and his family, is ill on account of uncertainty. *King v. —* 85

3. An

3. An order of removal was holden ill because the pauper was thereby sent to the master, and not to the parish where settled. *King v. Gravesend*

Page 97

Rent.

1. A debt due for rent upon a lease (whether parol or by indenture) and a debt upon bond are equal in degree. *Gage v. Aston* 67
2. A lessee, who covenants to pay rent, and to repair with express exception of casualties by fire, is liable upon the covenant for rent, although the premises are burnt down, and not rebuilt by the lessor. *Chesterfield v. Bolton* in note 3 633

Replevin.

1. An avowant may abate his own avowry for part of the rent distrained for before, but not after judgment. *Richards v. Cornesford* 42
2. Plaintiff in replevin shall not pay costs when the writ abates. *Smith v. Walgrave* 122
3. A defendant in replevin may plead property either in bar or in abatement. *Loveday v. Mitchell* 247
4. The sheriff may justify by grant of a replevin, without shewing the property of the goods to be in the plaintiff in replevin. *Miles v. Davies* 590
5. Of the different descriptions of pledges in replevin, and the effects of their omission. *Ibid.* in note 3. 593
6. The provisions made by the stat. 11 Geo. 2. c. 19. s. 22. for defendants in replevin. *Newland v. Collins* in note 302

Representation.

1. There is no representation after brother's and sister's children. *Pett v. Pett* 87

Restitution.

1. Ought to be made immediately upon a conviction of a forcible entry. *King v. Harris* Page 61

Revocation.

1. The same circumstances ought to be proved to be performed to make a good revocation in equity as at law, unless prevented by the party interested. *Piggott v. Pemice* 250
2. A will sufficient to pass a personal estate will not amount to a good revocation of a former will, whereby the real estate is devised according to the statute of frauds. *Limbery v. Mason* 451

Robbery.

1. On a special verdict in an indictment for a Robbery on the Highway, the words *then and there immediately* do not sufficiently ascertain the time to find the prisoners guilty. *King v. Frances* 478
2. A taking in the presence, is a taking from the person. *Ibid.* 479
3. If a taking be *violenter et contra voluntatem*, though the person be not put in actual fear, it is robbery. *Ibid.* in note *ibid.*

Scandalum Magnatum.

1. PEERS of Scotland after the union shall be intitled to this action. *Falkland v. Phipps* 439
2. So a Baron of the Exchequer is intitled to this action though the statute only mentions *Justices of the one Bench or the other*. *Ibid.* in note 440

Scire Facias.

1. Is no more than a writ of execution. *Anon.* 32
2. If

2. If a *Scire Facias* is brought upon a recognisance and execution is awarded, there may be another *Sci. Fa.* upon the same recognisance. *Ibid.*

Page 32

3. A *Sci. Fa.* was brought by Baron and Feme upon a judgment recovered by the Feme while sole, and after execution awarded the husband dies; a right is attached in the wife. *Ibid.*

31

4. Fifteen days between the teste and return of two *Scire Facias*'s inclusive is sufficient. *Goodwin v. Bearbank*

53

5. A *Scire Facias* is a judicial writ founded upon the judgment, which it ought to pursue. *Bodmyn v. Child*

187

6. A *Sci. Fa.* for the execution of a fine *sur grant and render* by him in remainder after an estate for life or in tail, must say that the tenant for life or tenant in tail is dead without issue. *Ibid.*

188

7. A man cannot plead to a *Scire Facias* matter which avoids or abates the writ. *Phillips v. Fowler*

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2. A surrender of a copyhold to the deputy of a deputy steward out of Court is good. *Parker v. Keck* 84
3. Where there are joint stewards and a surrender is taken by one of them it is good. *Ibid.* *ibid.*
4. A copyholder may make surrender in Court by Attorney. *Ibid.* 85
5. The surrender of a copyhold is to have the same favourable construction as a will. *Fisher v. Wigg* 91

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1. **A** COPYHOLD estate surrendered to several, equally to be divided, and to their respective heirs, is not a joint estate, but an estate in common. *Fisher v. Wigg*. Page 88
2. No precise words are requisite to make a tenancy in common. *Ibid.* *ibid.*
3. Joint tenants claim by one title, and tenants in common by several titles. *Ibid.* 91
4. Where tenant in common declares against another as receiver, it ought to be shewn by whose hands he receives, otherwise he ought to be charged as bailiff. *Walker v. Holyday* 272
5. Where there is a devise to one and his heirs, and to another and his heirs in another part of the will, they are joint-tenants. *Scrape v. Rhodes* 544
6. If one joint-tenant be indebted to the King, but a moiety shall be extended; and if he die before any extent, no extent shall be made on the land in the hands of the survivor. *King v. Manning* 619

Tender.

1. Where a man is to pay money upon an act being performed, and there is a tender of performing the act, and a refusal, it is equivalent to its having been done. *LANCASHIRE v. KELLINGWORTH* 116
2. When a tender is pleaded, a refusal ought also to be averred. *Ibid.* 117
3. And if the party is absent, it ought to be shewn that notice was given to him. *Ibid.* *ibid.*
4. Tender must be alledged to be at the last convenient time of the day. *Ibid.* *ibid.*
5. A tender pleaded, and that the party was not there to receive it, is good, without saying, nor any one else for him. *Ibid.* *ibid.*

6. Tender that the plaintiff was ready to pay what was due for the copy of a poll, till the officer demands something certain, held a good tender. *Philip v. Smith* Page 279

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2. A custom to give notice is good. *Ibid.* *ibid.*
3. The turning of cattle into them makes a fraudulent severance. *Ibid.* 24
4. No action lies against executors on the stat. 2 & 3 Edw. 6. c. 13. for not setting out tithes. *Att. Gen. v. White* 434
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17. The different grounds upon which religious persons could be exempt from the payment of Tithes. *Ibid.* ibid.
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6. The words *ad usum defendantis* instead of *ad usum querentis* after a verdict shall be rejected. *Palmer v. Stavelly* Page 115

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9. A verdict was set aside where the jury cast lots how they should give it. *Phillips v. Fowler* 525
10. A verdict was holden to be void, because the jury examined the witnesses apart. *Ibid.* 527
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F I N I S.

